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Supreme Court of the United States

OCTOBER TERM, 1958

No. [illegible]

NATIONAL BANK OF WASHINGTON, *Petitioner*,

vs.

THE WAYNE COUNTY BOARD OF SUPERVISORS, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

NATIONAL BANK OF DETROIT, *Petitioner,*

v.

THE WAYNE OAKLAND BANK AND RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY, *Respondents*

Petitioner, National Bank of Detroit, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in the above-entitled case.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (Appendix A, p. 1)[1] are not reported. The judgment of the Court of Appeals (Appendix B, p. 4) is reported at 249 F. 2d 445 and the opinion of that Court denying rehearing (Appendix B, p. 4) is reported at 252 F. 2d 537.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1957 (J. A. 266a). A timely petition for rehearing was denied on February 25, 1958 (J. A.

[1] Appendix references are to the appendices of this petition. Reference to J.A. are to the Joint Appendix and other Appendices filed by the parties in the Court of Appeals and to the proceedings in that Court.

282a). The time for filing a petition for certiorari was extended by Mr. Justice Burton on May 19, 1958, to and including July 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This petition presents important questions relating to the administration of the National Bank Act.

1. The fundamental question is whether the National Bank Act, in granting the Comptroller of the Currency power to authorize national banks to establish branches within a state "subject to the restrictions as to location imposed by the law of the State on State banks," requires compliance not only with state laws limiting the geographical area within which a state bank may establish branches, but also with those limiting the number of banks that may establish branches in a particular locality.

2. There is also the question whether a state bank, by alleging threatened economic injury from future competition of a branch of a national bank, has standing to sue to enjoin the Comptroller of the Currency from approving, and the national bank from undertaking, the establishment and operation of such a branch.[2]

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[2] This petition presents an additional question which, although not relied on as a reason for granting the writ, will be presented to the Court as a ground for reversal in the event the petition is granted. This question is whether, once the Comptroller has issued to a national bank, at a time when he was authorized to do so under the National Bank Act, his approval of the establishment and operation of a branch, the approval may be nullified by subsequent action of state authorities or state bank competitors of the national bank.

STATUTES INVOLVED

1. The National Bank Act, R. S. 5155, as amended, 12 U. S. C. 36, provides, in pertinent part, as follows:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within

the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock. As amended July 15, 1952, c. 753, § 2 (b), 66 Stat. 633.

2. Section 34 of the Michigan Financial Institutions Act, as amended, 17 M. S. A. 23.762, provides as follows:

SEC. 34. Any bank having a capital of at least $50,000.00 may, with the approval of the commission, establish and operate a branch or branches within a village or city other than that in which it was originally chartered: Provided, That the village or city in which it is proposed to establish and operate a branch is located in the same county in which the parent bank has its principal office or, if not in said county,

then within 25 miles of said parent bank or in a contiguous county at a point more than 25 miles from the parent bank, if such county has no bank: Provided further, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation: Provided further, That the commission shall not grant such approval unless the parent bank has capital and surplus in an amount at least equal to the aggregate minimum capital and surplus, respectively, required for the establishment of a bank in each of the various places where such bank and its branches are to be located and unless the commission is satified as to the sufficiency of the capital and surplus of the bank, the necessity for the establishment of such branch or branches and the prospects of successful operation if established.

Any bank may, with the written approval of the commission, establish and operate a branch or branches within the limits of the city or village in which said bank is located: Provided, That the commission is satisfied as to the necessity for the establishment of such branch and the prospects of successful operation if established. No branch of any such bank shall be moved from 1 location to another within the same city or village without the written approval of the commission.

STATEMENT

The facts are as stipulated by the parties (J. A. 39a-54a). On January 20, 1956, petitioner, a national bank in Detroit, Michigan, filed with the Comptroller of the Currency an application for approval of a branch in Troy, Michigan, fifteen miles distant (J. A. 44a). The application was filed under § 36(c) of the National Bank Act, which provides that a national

bank within a state may, with the approval of the Comptroller of the Currency, establish and operate new branches:

> "... at any point within the State ... if such establishment and operation are at the time authorized to State banks by the statute law of the State ... and subject to the restrictions as to location imposed by the law of the State on State banks."

The relevant Michigan statute provides that:

> "Any bank ... may ... establish and operate a branch or branches within a village or city other than that in which it was originally chartered ... Provided, That the village or city ... is located ... within 25 miles of said parent bank ... Provided further, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation. ..."

It was apparent both that branch banking was "at the time authorized to State banks" by Michigan law and that the proposed branch, being only fifteen miles from the parent bank, was within the twenty-five mile restriction "as to location" contained in the Michigan statute. Both these requirements being satisfied, the Comptroller of the Currency, finding that the proposed branch satisfied the federal requirements of convenience and necessity,[3] notified the petitioner on March 19, 1956,

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[3] As stated in note 7 below, prior to the approval of the establishment of a national branch, the Comptroller must make a number of findings as to the financial structure, history and prospects of the proposed branch. The Comptroller is also required to consider "the number of branches now in operation and

that its application was approved (J. A. 45a). The letter of approval stated that the formal certificate "authorizing establishment of the branch will be issued" when the Comptroller is advised of the exact name, address and opening date of the branch, it being "understood, of course, that the branch should not open until the certificate has been issued" (J. A. 92a).

Pursuant to the letter of approval, petitioner immediately acquired an option on its proposed site, commenced grading operations and on July 26, 1956, entered into a contract for the construction of the proposed branch building (J. A. 45a). Construction was completed and the branch ready to open on October 19, 1956 (J. A. 46a). On August 17, 1956, however, before the formal certificate had been issued, the respondent The Wayne Oakland Bank (hereafter called respondent), a state bank with a branch recently established [4] in Troy, brought this action in

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their location, the proposed location of the new branch and the distance from the head office [to] the nearest banking facilities, [and] the convenience and needs of the community to be served by the new branch, . . ." 12 C.F.R. § 4.5)

Troy is the fifth or sixth largest city in area in Michigan, having approximately 28 square miles. It is a part of the rapidly growing Metropolitan area of Detroit (J. A. 40a). The proposed branch of petitioner is approximately three miles from respondent's branch (J. A. 43a). The Comptroller in granting approval of petitioner's branch determined that Troy is a growing community with present and potential business sufficient to support petitioner's branch there as well as that of respondent (J. A. 93a).

[4] Respondent had applied, on April 27, 1955, to the Michigan Banking Commissioner for authorization to establish a branch in the territory which later became the City of Troy (J. A. 40a). On August 9, 1955, it was notified that such authorization was granted subject to the condition that prior to the opening of the branch,

the District Court[5] to enjoin the Comptroller from issuing the certificate and the petitioner from establishing or operating the proposed branch[6] (J. A. 6a-14a).

The respondent contended that the requirement of the National Bank Act that the Comptroller observe state "restrictions as to location" of branches required compliance not only with the provision of the Michigan statute authorizing branches within a twenty-five mile radius of the parent bank but also with another restriction that limits to one the number of state banks that may establish branches in a given locality. Respondent further alleged that the competition of petitioner's proposed branch, if established as threatened, would cause it irreparable injury.

The District Court upheld respondent's contentions (Appendix A, p. 3), at the same time rejecting also

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the capital account of respondent be increased to at least $2,000,000 (J. A. 55a). On April 2, 1956, the Michigan Banking Commission issued to respondent a certificate authorizing the establishment of a branch at a temporary address in Troy until its permanent office was constructed. Respondent immediately opened its branch office in temporary quarters in a local dry cleaning establishment known as "Troy Cleaners." On May 28, 1956, respondent moved its branch office to its permanent location (J. A. 41a, 57a-60a).

[5] The complaint was originally filed in the United States District Court for the District of Columbia (J. A. 6a). A temporary restraining order was issued by that Court on August 30, 1956, and on November 2, 1956, the cause was transferred to the United States District Court for the Eastern District of Michigan (J. A. 18a-21a).

[6] On November 21, 1956, the United States District Court for the Eastern District of Michigan, on the Comptroller's motion, joined petitioner as a party defendant to the action (J. A. 23a). Subsequently respondent's complaint was amended *inter alia* so as to run against petitioner (J. A. 33a).

the challenge by the Comptroller and the petitioner to respondent's standing to sue, and entered judgment enjoining the threatened actions.

On appeals by petitioner and the Comptroller of the Currency, the Court of Appeals affirmed without opinion (Appendix B, p. 4). Petitions for rehearing by both petitioner and the Comptroller were denied in an opinion adopting the construction of the National Bank Act urged by respondent and upholding respondent's standing to sue (*id.* at pp. 4-14).

REASONS FOR GRANTING THE WRIT

I

The Court Below Has Decided Erroneously an Important Question Under The National Bank Act Which Has Not Been But Should Be Decided By This Court

The decision below is the first decision by a Court of Appeals construing Section 36(c) of the National Bank Act, and presents a question which is of the utmost importance in the administration of that statute.

The issue, summarily stated, concerns the extent to which branching operations of national banks are limited by reason of the provision in Section 36(c) subjecting branches of national banks to the same "restrictions as to location" as are imposed by state law on branches of state banks. Petitioner contends that this phrase encompasses only such restrictions as the state may impose as to the geographic area or areas within which a state bank may establish branches. Respondent, and the court below, read the phrase as incorporating further limitations by construing it to include those provisions of state law which prescribe the

number of state banks permitted to operate branches in a given locality.

The basic statutory pattern from which this issue arises in the present case may be stated very briefly. Section 36(c) of the National Bank Act provides that a national banking association may, with the approval of the Comptroller of the Currency, establish and operate a branch

> ". . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

Congress has thus specified only two respects in which the Comptroller's approval of the establishment and operation of a branch by a national banking association is to be limited by state laws.[7] First, the appropriate

[7] In Title 12, Section 4.5 of the Code of Federal Regulations, the Comptroller has set forth the standards which apply to an application from a national bank for approval to establish a branch:

> ". . . District Chief Examiner is instructed to make an investigation, taking into consideration the financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the number of branches now in operation and their location, the proposed location of the new branch and the distance from the head office, the nearest banking facilities, the convenience and needs of the community to be served by the new branch, the nature of the potential clientele and possi-

state statute in effect "at the time" the Comptroller's approval is given, must authorize branch banking by state banks.[*] Second, a national bank must comply with "the restrictions as to location, imposed by the law of the State on State Banks."

The Michigan law (§ 34 of the Michigan Financial Institutions Act, as amended, 17 M.S.A. 23.762, set forth *supra*, pp. 4-5) specifically authorizes state banks to establish and operate branches. There is no question that petitioner's proposed branch complies with the "restrictions as to location"—the geographical limitations—contained in the Michigan law. The issue in this proceeding, however, arises from the holding of the court below that the geographical limitation is not the only "restriction as to location" in the Michigan law. The court below construed that phrase in Section 36(c)

ble business available, including an estimate of contemplated volume within a reasonable period of time and the prospects of successful operation of the branch, together with any other pertinent factors.

"(2) The examiner's report is submitted to the District Chief Examiner who forwards it to this office with his own comments and recommendation. The information and data is analyzed, briefed and routed in the same way as an application for a charter.

"(3) If the decision is unfavorable the applicant bank is so notified. If the decision is favorable the Comptroller issues a formal certificate evidencing his approval and consent to the establishment and operation of a branch bank at the designated location."

[*] The effort of the court below to bolster its conclusion by using the phrase "at the time" as a separate sort of area restriction (see Appendix B, p. 8) is plainly unsound. In context, there can be no doubt that the phrase "at the time" refers only to the fact that state statutes may be changed and that a state which authorizes branch banking may change its policy by legislation or vice versa.

as also incorporating another restriction in the Michigan Financial Institutions Act which limits the *number* of state banks that may have branches in a given community and reads as follows:

> "Provided further, that no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation . . . ."

This proviso is not within either the letter or the intention of the "restrictions as to location" clause of Section 36(c) of the National Bank Act. It is wholly different from the geographic limitation of the Michigan statute, which limits the area in which a branch may be established by a state bank and operates on branches of state and national banks alike. Indeed, that the quoted proviso is not a "restriction as to location imposed on State Banks" is patent from the fact that respondent has a branch in the very "location" in which petitioner has been enjoined from establishing one. The proviso is instead a limitation on the *number* of state banks that may have branches, and it is a simple misuse of language to characterize it as a "restriction as to location imposed by the law of the State on State Banks."[9]

[9] The court below was able to interpret the proviso as an area restriction only by reading the first, or authorizing, clause of Section 36(c) as if it also contained a location restriction. It did this by construing the phrase "at any point" to mean "at the same location" and having it modify the phrase "at the time" (Appendix B, p. 8). As so read, this first clause of Section 36(c) would permit a national branch to operate only if the establishment of a state branch is permitted in the same location at the same time. This construction makes the second clause of Section 36(c), the "restrictions as to location" clause, surplusage. In context, however, the authorization clause permits the establishment

The importance of the issue, moreover, is not limited to the proper classification of this proviso in the Michigan law. This proviso is but the Michigan illustration of several different conditions of a non-geographical nature that are contained in the banking laws of the thirty-six states and territories which permit branch banking but which specify certain requirements which must be met before a state bank may establish and operate a branch in a given location. Indiana, for example, authorizes the establishment of state branches only if "the welfare of any other bank already established in such city will not be jeopardized." New Jersey prohibits a state banking corporation from establishing a branch in any city, other than the city or county in which it maintains its principal office, unless it is found "that the interests of the public will be served to advantage" and "that conditions in the locality in which the proposed branch office is to be established afford reasonable promise of successful operation." There are many others.[10] In sum, the effect

of a national branch "at any point" in the state if the establishment of branches is "at the time authorized to State banks by the statute law of the State." As noted in note 8 above, the phrase "at the time" refers not to any location restrictions but to the fact that state statutes are subject to change.

[10] The status of branch banking in the various states and territories is set forth in Appendix C to this petition, which also indicates various types of legislative conditions imposed. As shown in Appendix C, of the 36 states and territories authorizing state branch banking in principle, 18 have specific statutory provisions which spell out the precise geographic area in which a branch will be permitted. Beyond these "restrictions as to location", the banking statutes of all 36 states and territories contain numerous conditions which must be met by a state bank prior to establishment and operation of a given branch. This type of limitation is also shown by the state statutes set out in Appendix C.

of the holding by the court below is to sweep within the federal "restrictions as to location" clause a myriad of state law conditions having no relation to "location."

The interpretation of the "restrictions as to location" provision of Section 36(c) adopted by the court below is not only contrary to its manifest meaning, but also is in direct conflict with the purpose of Congress in enacting this and other provisions of the National Bank Act. The legislative history of Congressional concern with national branch banking indicates that Congress intended to confine the "restrictions as to location" provision of Section 36(c) to state law restrictions of a geographical nature to provisions dealing with the geographical *area* in which a state bank may establish branches.

National banks were first permitted to engage in branch banking limited, however, to the city in which they were domiciled by the McFadden-Pepper Act of 1927, 44 Stat. 1228. The present version of the National Bank Act was enacted in 1933. The bill which ultimately resulted in this Act, as initially introduced in the Senate (S. 4412, S. Rep. No. 584, 72d Cong., 1st Sess. (1932)), would have empowered a national bank to establish branches at any place within the state in which its principal office was situated without regard to whether state banks were also authorized to branch by state law. Since this would have given national banks a vastly preferred position over state banks in establishing branches, serious opposition was encountered from the proponents of state banks (See, *e.g.*, 75 Cong. Rec. 9299, 9973; 76 Cong. Rec. 1330, 1449). Confronted with this opposition, the Senate adopted a compromise (76 Cong. Rec. 2205), which contained, for the first time, the phrase "restrictions as to

location" which was later to be incorporated in the National Bank Act. The compromise amendment permitted the establishment of national bank branches

> "at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to state banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks."[11]

Both the conditional authorization provision and the "restrictions as to location" clause thus reflect state branch banking law as it existed when the amendment was adopted.[12] At the time these provisions were enacted, nine states expressly authorized state-wide branch banking without any restrictions as to area of operation.[13] Seven states had no statutory provisions covering the subject of branch banking,[14] and eighteen

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[11] The amendment, as approved by the Senate in S. 4412, was incorporated in S. 1631 in the 73d Congress and, without change pertinent to this case and by way of amendment to H.R. 5661 (77 Cong. Rec. 4181 (1933)), became Section 23 of the Banking Act of 1933, 48 Stat. 189-190 (1933).

[12] The Legal Status of Branch Banking in the United States, by Frederick A. Bradford, Ph. D., Professor of Economics and Head of the Department of Finance, Lehigh University (1940) and a Historical Survey of Branch Banking in the United States, by Ray B. Westerfield, Ph. D., Professor of Political Economy, Yale University (1939), both issued by the American Economists Council for The Study of Branch Banking.

[13] Arizona, California, Delaware, Maryland, North Carolina, Rhode Island, South Carolina, Vermont and Virginia.

[14] Michigan, New Hampshire, North Dakota, Oklahoma, South Dakota, Wyoming. In Kentucky, however, court decisions permitted additional offices or banking agencies.

of the states had statutory provisions prohibiting branch banking in any form.[15] The statutes of fourteen states, however, authorized state banks to operate branches within a restricted geographical area surrounding the parent bank. For example, these state "restrictions as to location" permitted state banks to establish any number of branches in the "same or adjoining" or "contiguous" counties, or the "same city, or city or village contiguous thereto or county or counties in which [the] municipality containing [the] main bank is located."[16]

Considered in light of this statutory situation in the states as it existed in 1932, the meaning of the "restrictions as to location" provision of the National Bank Act is clear. National branch banking could be authorized without geographical "restrictions as to location" in those nine states which permitted state branch banking to be conducted on a state-wide basis. In addition, national branches could be authorized in those fourteen states which permitted state banks to operate branches in a restricted area, but such national branches were to be limited by the same area restrictions imposed on state branches. Similarly, national branch banking could not be authorized in the seven states which had no statutes covering the subject of branch banking or in the eighteen states which prohibited it entirely. Accordingly, in any state where

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[15] Alabama, Arkansas, Colorado, Connecticut, Florida, Idaho, Illinois, Kansas, Minnesota, Missouri, Nebraska, Nevada, New Mexico, Oregon, Texas, Utah, Washington and West Virginia.

[16] The Legal Status of Branch Banking in the United States, by Frederick A. Bradford, Ph. D., Professor of Economics and Head of the Department of Finance, Lehigh University, p. 19. And see 18 Fed. Res. Bull. 455 (1932).

branch banking was permitted in principle, branch operations by national banks were restricted under federal laws only by the area "restrictions as to location" of state law.[17]

In concluding to the contrary, the court below disregards the acknowledged legislative purpose of the National Bank Act. Its holding distorts the National Bank Act—legislation designed to place national and state banks on a competitive equality—by interpreting it to *prohibit* competition between state and national bank branches. The legislative history of the National Bank Act demonstrates, however, that even the champions of state banks did not desire, in the event national branch banking was approved, to make state branches immune from competition by national branches. The controlling factor influencing Congress was its opposition to granting a monopoly position, be it to a large bank or small, or be it to a national or state institution. Nothing could be more remote from the Congressional intention than the situation created by

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[17] The meaning of the "restrictions as to location" clause is further highlighted by the second sentence of Section 36(c) which was added by Congress in 1935 (Act of August 23, 1935, c. 1614, Title III, Sec. 305, 49 Stat. 708). This sentence authorizes national banks to operate seasonal agencies in resort communities. The authorization is granted where state law permits state banks "to maintain branches within county or greater limits." This quite obviously is also a reference to state location restrictions of a particular geographic scope. For example, national banks may not establish seasonal agencies in those states which permit state banks to maintain branches but limit such branching operations to areas smaller than the county limits. Thus, although branches are permitted state banks by the laws of Georgia, national banks may not have seasonal agencies in that state since its laws limit the establishment of state branches to an area smaller than the county in which the parent bank is located.

the decision below—one state bank having a monopoly on branches in a large and rapidly growing section of the metropolitan area of Detroit.

Thus, objecting to a proposal made during the consideration of the 1933 legislation that no branch could be established except by taking over an existing unit bank, Senator Norris, an opponent of branch banking, stated:

> "[I]t does not seem to me to be fair, speaking from the community standpoint, to permit somebody who has already established a bank, no matter what the community may think, to be able to say and have the supreme power to designate whether there shall be another bank there or whether there shall not be another bank." (76 Cong. Rec. 1419)

Pointing to the very evil of giving a banking monopoly such as that which results under the decision below, Senator Norris emphasized:

> " . . . but the big bank has got to buy out the local bank before it can be changed into a branch bank. It may be that my objection ought to come from those who favor branch banking. It seems to me it ties their hands; and if we are going to have branch banking, I do not want to do that. We talk about the large bank in the city that we are afraid of, and it is said this is one way to get around it. I am no more anxious to give the little fellow a monopoly than I am to let the big fellow have the monopoly. I think it is just as bad to say to Mr. A. in a town where they have but one bank with $10,000 capital, 'You may hold up the whole community and prevent anybody else coming into competition with you,' as it is to give the same power

> to Rockefeller or any of the other big bankers." (*Ibid.*)

Senator Bratton, whose amendment first incorporated the phrase "restrictions as to location," also objected to the proposal because it

> "... would permit a banker in a given town to say whether a branch bank should be established there or not. It would give him a complete monopoly upon added banking facilities, so far as the establishment of a branch bank was concerned." (76 Cong. Rec. 1450)

This legislative policy of competitive equality has long been recognized by the Court.[18] Mr. Justice Brandeis, in *Lewis* v. *Fidelity Co.*, 292 U.S. 559, which concerned the authority of national banks under a 1930 Act to secure deposits of public moneys, succinctly stated the Court's long standing recognition of this Congressional policy:[19]

> "The language of the Act is broad enough to authorize giving a general lien on present and

[18] In Burnes National Bank v. Duncan, 265 U.S. 17, 24, the Court held that a State could not "deprive national banks of their power to compete that Congress is authorized to sustain." The most recent decision in point is Franklin National Bank v. New York, 347 U.S. 373, 375, where the Court stated that national banks as "federal institutions may be at no disadvantage in competition with state-created institutions."

[19] Cited as support for the statement were cases decided over an extended period, including Van Allen v. The Assessors, 3 Wall. 573; Mercantile Bank v. New York, 121 U.S. 138; First National Bank v. Union Trust Co., 244 U.S. 416; Burnes National Bank v. Duncan, 265 U.S. 17; and First National Bank v. Hartford, 273 U.S. 548.

> future assets, wherever banks organized under the laws of the State have such power; and it should be given that construction. For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied in the provision concerning taxation. In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization. It appears also to have been of some influence in securing the grant in 1913 of the power to loan on mortgage." (292 U.S. at 564)

Since the Congressional policy evidenced in the National Bank Act was to enhance the competitive position of national banks so that in their branch operations they would be on an equal competitive level with state banks, the court below committed clear error when it found that Congress intended to confer an immunity from competition on state banks.

The main thrust of respondent's argument below was that the Michigan proviso granting a city-wide state banking monopoly to the state bank whose branch first commenced operation in the city was, as a matter

of state law,[20] something akin to a restriction as to location. The breaking point in this argument is that the phrase "restrictions as to location imposed by the law of the State on State banks" is a federal statutory phrase that can be given meaning only by the Congress. As we have shown, Congress had no such comprehension in mind when it enacted the National Bank Act. If state law be relevant in this regard, most states preclude the operation of a branch of a state bank in a given location unless it is determined that there is a

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[20] Aside from its success in the two lower federal courts, respondent can draw only cold comfort from viewing the problem as one of state law. The meaning of the Michigan proviso as it relates to the instant problem has not as yet been passed on by any Michigan court. The proviso has been officially construed by a state authority only once. This construction is the subject of Opinion No. 1370 of the Attorney General of Michigan (J. A. 69a). In that opinion the Attorney General was asked to rule on the following question:

> "If the State bank under authority of the Banking Commissioner actually starts regular banking operations in a branch which it has established in the city in question prior to the actual opening of the proposed branch of the National Bank, would the National bank be estopped [by the Michigan proviso] from starting operation of its own branch office in said city?"

The Attorney General of Michigan answered the question in the negative (J. A. 72a).

As noted supra, note 2, this petition does not treat the dispute over the Comptroller's approval of its branch in Troy as a separate reason for granting certiorari. Nevertheless, petitioner submits that the Comptroller had given his unconditional approval to establish a national branch on March 19, 1956, almost a month before respondent's branch was "in operation." Respondent has taken the position that the Comptroller's approval was only a

public need for such branch.[21] Unless these and other conditions are met or state commission findings are made, state branches may not operate in a given location. It will be apparent that irrespective of how these conditions are described under state law, they are simply not relevant as a matter of federal statutory construction.

If a state may impose its own regulatory conditions on the branching operations of national banks by term-

tentative commitment at the time it commenced operation of its branch in Troy since the formal certificate had not been issued.

The Comptroller's approval of March 19, 1956, was communicated to petitioner by telegram of that date (J. A. 91a). This telegram contained no qualification. The approval letter of the same date (J. A. 92a) also contained no qualification. It requested only that the Comptroller be advised of the exact street address of the Troy branch and the popular name of the branch for incorporation into the certificate. This data quite obviously cannot be determined with any degree of certainty when the Comptroller first approves the establishment and operation of the branch. The Comptroller's certificate of authorization, issued, as a matter of administrative practice, when the branch is ready to commence actual operation, is merely a formalization of the Comptroller's approval given under the statute. The certificate itself is not, under the National Bank Act, a statutory requirement for the establishment and operation of a branch. Compare R.S. 5169, 12 U.S.C. 27. It is, in brief, an administrative device adopted by the Comptroller as an internal aid to the discharge of his supervisory and administrative responsibilities under the National Bank Act.

That the Comptroller's approval was a final commitment is confirmed by the Comptroller's deposition (J. A. 125a-143a).

[21] In addition to the state laws listed in Appendix C, the construction of the Wisconsin statute, now repealed, by the Attorney General of that state is illustrative of the national banking chaos which the decision below would foster. The Wisconsin statute authorized state banks to establish and operate "stations" only in those communities "not having adequate banking facilities." The State

ing them conditions precedent to establishment and operation of state branches in a given locality, national banks, creatures of federal law and operating as banking agents of the federal government, will no longer be the exclusive instrumentalities of that government which they were held to be by this Court in *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283:

"National banks are instrumentalities of the Federal government, created for a public purpose, and

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Banking Commission of Wisconsin requested an opinion as to whether this condition would apply to a national bank as well. The Wisconsin Attorney General, in holding in an opinion of March 19, 1947 that such conditions did not apply to national banks, stated:

"In our judgment the provisions of sec. 221.255 which provide that a paying and receiving station may be established in any community not having adequate banking facilities and which require the banking commission to determine whether public convenience and advantage will be promoted by the establishment of a station as well as the other factors which must be considered before a state bank can establish such a station as provided in sec. 221.255 do not apply because sec. 5155(c) of the National Bank Act says that a national bank may with approval of the comptroller of the currency establish and operate new branches at any point within the state where it is established if state banks are affirmatively authorized by state law to establish and operate branch banks by a specific statute and '*subject to the restrictions as to location imposed by the law of the state on state banks.*' [Emphasis ours.] Ordinary rules of statutory construction would indicate that this is the only restriction applicable to state banks which would apply to a national bank whenever a state by specific statute affirmatively authorizes state banks to engage, establish and operate branches using that term as defined in sec. 5155(f).

"The words 'restrictions as to location' in our opinion mean restrictions on geographical location, such as the three-mile limit imposed by sec. 221.255(1), and not to any restriction of the kind imposed upon state banks seeking a permit to establish a receiving and paying station by subsections (1) and (3) of the same section

as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly

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to the effect that a station can be established and maintained only in a community not having banking facilities or where public convenience and advantage would be promoted by its establishment, which would if answered in the negative prevent the establishment in any particular location. To hold otherwise would make it possible to nullify the evident intent of congress in enacting sec. 5155(c). As shown by the case previously cited, the broad over-all intent of congress in enacting sec. 5155 as it now appears, was to permit national banks to have branches (using the word in the sense in which it is defined by sec. 5155(f)) when the state by statute permits state banks to have branches. To repeat again what was said in the Michigan case cited (p. 465 of 136 A.L.R.): "'Only where the states make the competition possible by letting their own institutions have branches'" are national banks to have branches. Having made the competition *possible*, national banks as corporate instrumentalities of the United States created for public purposes need look only to the terms of the National Bank Act for guidance and approval of their actions.' [Emphasis ours.] If it were to be said that the 'restrictions as to location imposed by the law of the state on state banks' should include in addition to restrictions as to geographical location, such matters as the question whether the community has adequate banking facilities or whether public convenience and advantage would be promoted by establishment of a station, we would then be in a position where national banks could be denied the right to establish a branch in a community and compete with state banks because the area already had adequate banking facilities. If such construction were adopted, it would be possible to have a situation where no national bank in the state could establish a branch even though the state law specifically and affirmatively permits state banks to establish branches, in event it appeared that all communities in the state already had adequate banking facilities. It is very evident that congress never intended any such result." Opinions of the Attorney General of Wisconsin, 1947, Martin (Vol. XXXVI, pp. 100-101). (All emphasis in original).

> conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this Court."

Congress alone determines when and to what extent state banking regulations shall govern national banks. Congress has not seen fit to incorporate the banking regulations of each of the thirty-six states and territories which permit branch operations by state banks. This follows naturally from the many federal functions of national banks, which include acting as depositories for government funds, as federal fiscal agents, and as important instrumentalities in the Federal Reserve System. It is of vital importance that these functions not be impaired by subjecting national banks to a variety of state regulatory policies which Congress did not intend to be applicable and which, if applied, would subvert the pattern which Congress intended to create.

II

The Holding Below That Respondent State Bank Had Standing to Maintain This Action Conflicts With an Applicable Decision of This Court and The Ruling of Another Court of Appeals.

In addition to the basic question as to the coverage of the National Bank Act, a further issue meriting the Court's consideration is whether respondent had standing to maintain this suit against the Comptroller and petitioner.

The sole action of the Comptroller challenged by respondent in these proceedings is a ruling on an application by the petitioner national bank. There was no application before the Comptroller from respondent, a state bank, nor was there any statutory basis for the respondent to be a party to the Comptroller's deliberations and decision with respect to a national bank's application made pursuant to the National Bank Act (12 U.S.C. § 21, *et seq.*). This statute contains no provision for judicial review and nowhere suggests that a state bank, by virtue of its position as a competitor, has standing to seek review of action by the Comptroller relating to a national bank.

Under the rule laid down by this Court in *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, the threat of competitive injury does not in these circumstances suffice to give the respondent state bank standing to seek court review of the Comptroller's action. Here, as in the *Tennessee Electric Power* decision and more recently in *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (D.C. Cir. 1955), *certiorari denied*, 350 U.S. 884, the essence of the complaint is that the plaintiff will suffer competition from the action of administrative officials taken pursuant to statute. As the Court of Appeals for the District of Columbia Circuit stated in holding there was no standing to sue in the *Kansas City Power* case:

> "[The federal officials] have not undertaken to regulate [the plaintiffs] in any way. They have not been ordered to abandon any of their activities or to forego the expansion programs planned by them. They have not been subjected to any obligation or duty. Their sole interest and objective is

to eliminate the competition which they fear." (225 F. 2d at 928)

The court below swept aside the question of standing to sue in a single paragraph.[22] Its holding is in conflict with the decision of this Court in *Tennessee Electric Power* and that of the Court of Appeals in *Kansas City Power*. Respondent cannot avoid conflict with these decisions, as it sought to do below, by a claim that it had a "right" to be immune from the competition from petitioner's branch and that such competition would therefore be "unlawful." As the Court recognized in the *Tennessee Electric Power* case, where there is "no contractual or property right to be free of competition," *i.e.*, where the statutory policies of the states with respect to competition were "subject to alteration at the will of the legislature" (306 U.S. at 141), the "rights" of the companies alleging competitive injury did not give them standing to sue. As this Court stated, where a state has not precluded itself from changing its policy, the "right" arising from a declaration in a state

[22] The Court of Appeals' entire consideration of the point was limited to the following statement:

> "As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition which was prohibited by the federal statutes subjecting national banks to the same rules of law as cover state banks. The district court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated." (Appendix B, p. 14)

statute of a specific policy creates no vested right to be free of competition which would support standing to seek court review.[23]

Here respondent neither does nor can assert any "legal right" to be free from competition. As has been seen, respondent's contention is that the National Bank Act adopts the policy of the state to permit branch banking only when a "need" is demonstrated by the absence of any other bank, and thus gives it a right to be free from competition in the area in question. Respondent does not contend, nor could it, that Congress is in any way barred from changing the National Bank Act to eliminate this alleged "right"; nor, indeed, that the State of Michigan is precluded from changing its own statute to eliminate the "exclusive" right which respondent asserts. As in the *Tennessee Electric Power* case, the alleged "right" relied upon is one which rests upon no more than an announced legislative policy which is subject to alteration at the will of either Congress or the Michigan legislature. That alleged statutory declaration alone "creates no vested right to its maintenance" in respondent. Even on the assumption that respondent correctly construed the "declaration of a specific policy" in both the federal and state laws, respondent cannot, under policies which may be changed at any time, assert a "legal right" giving basis to maintain the suit.

The federal officer here involved, the Comptroller of the Currency, is called upon daily to make rulings with respect to the establishment and operation of national

[23] The fact that rights dependent on legislative policy, which was subject to change, did not give a vested right to be free of competition was also recognized by the court in the Kansas City Power case. See 225 F. 2d at 929, n.6.

banks and branches. Until the decision below, these rulings had been made for almost a century without the unjustified delays and uncertainties that would attend their general review in the courts at the instance of an alleged injured competitor. Similarly, the day-to-day operations of many other federal agencies have never been subject to disruption by court action instituted by a person, not involved in the federal agency proceeding, who claims competitive injury.

The decision below, in its undiscriminating approach to the question of standing, baldly disregards the controlling decisions. It casts serious doubt on the principles governing the standing of parties to seek review, on the basis of competitive injury, of certifications, licensing, and similar actions by federal administrative officials in many fields, and could open the federal courts to "a vista of litigation hitherto unrevealed." Compare *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 at 481. The Court may wish to consider this issue, particularly since it has but recently expressed interest in this general area in the case of *Chicago* v. *Atchison T. & S. F. R. Co.*, Nos. 103, 104, decided June 16, 1958 (see slip op., pp. 4-5). As that litigation developed, however, the standing to sue issue was of subsidiary importance (*id.*, p. 6) and the need remains for an authoritative pronouncement on the basic issue whether court review of action by federal government officials can be had, as here, at the request of a competitor claiming injury who had no interest or standing whatever in the administrative proceeding.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be granted.

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JULY, 1958

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APPENDIX A

Findings of Fact and Conclusions of Law of the District Court

(Filed January 30, 1957)

FINDINGS OF FACT

1. This action was brought by the Wayne Oakland Bank, a state bank organized and operating under the laws of the State of Michigan, against Ray M. Gidney, Comptroller of the Currency of the United States. Since a federal question was involved, the action was commenced in the District Court of the United States for the District of Columbia.

2. Plaintiff alleged that the Comptroller was about to authorize the National Bank of Detroit to open a branch in Troy, Michigan. Since plaintiff had opened a branch bank in Troy prior to the institution of this suit, it asserted that under 12 U. S. C. 36 and M. S. A. 23.762, it would be unlawful for the National Bank of Detroit to operate a branch in Troy. Plaintiff sought a declaratory judgment to that effect and an order restraining the Comptroller from giving his certificate of authority which would authorize the National Bank of Detroit to open a branch bank in Troy.

3. The federal statute here in controversy provides in part:

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches * * * (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question * * * and subject to the restrictions as to location imposed by the law of the State on State banks." 12 U. S. C. 36.

Section 23.762 M. S. A. provides:

> "Any bank having a capital of at least $50,000 may, with the written approval of the commission,

establish and operate a branch or branches within a village or city other than that in which it was originally chartered * * * Provided further that no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation."

4. Plaintiff obtained a temporary restraining order and then, after the Court had indicated that it would grant plaintiff's Motion for a Preliminary Injunction, the Court entered an order with the consent of both parties transferring the case to this District and continuing the temporary restraining order in effect until this Court should rule on the plaintiff's Motion for a Preliminary Injunction.

5. This Court, by Judge Levin, permitted the National Bank of Detroit to intervene as a party defendant. The plaintiff then amended its complaint to seek an order restraining the National Bank of Detroit from establishing a branch bank in Troy, Michigan.

6. The parties then prepared and filed a stipulation containing all the facts relating to the case on which they could agree. In addition, several exhibits were received into evidence and the testimony of two witnesses was taken.

7. From the stipulation and from the evidence so adduced, this Court finds:

(a) On April 2, 1956, with the approval of the Michigan Banking Commissioner (hereinafter called the Commissioner), plaintiff opened a branch bank in Troy pursuant to application therefor filed by plaintiff with the Commissioner on April 27, 1955.

(b) On April 2, 1956, no other bank had established a branch in the City of Troy.

(c) On January 19, 1956, defendant, National Bank of Detroit, applied to the Comptroller of the Currency for permission to establish and operate a branch in Troy. On March 19, 1956, the Comptroller notified the National Bank of Detroit that such application had been approved and stated that a certificate would be issued when the Comp-

troller was advised of the definite opening date and the exact street address of the branch. The branch was not to be opened until that certificate had been issued.

(d) The Troy branch of the Wayne Oakland Bank is presently operating at a loss. If the National Bank of Detroit opens a branch in Troy the competition resulting from such operation will cause damage to plaintiff which will certainly accrue; however, the exact amount of such damage would be impossible to determine.

CONCLUSIONS OF LAW

1. Since on April 2, 1956, the National Bank of Detroit had merely obtained the approval of the Comptroller of the Currency to establish a branch in Troy, it cannot be said that the branch was established on that date.

2. Since the Wayne Oakland Bank has opened and has in operation a branch bank in the City of Troy, the statutes now in effect prohibit the establishment in Troy of any branch of a bank, such as the National Bank of Detroit, which is chartered to do business in another city. 12 U. S. C. 36, M. S. A. 23762.

3. It follows that plaintiff is entitled to an order restraining the Comptroller from issuing a certificate of authority to the National Bank of Detroit to establish and operate a branch in Troy, Michigan, and an order restraining the National Bank of Detroit from establishing and operating such a branch.

ARTHUR F. LEDERLE,
Chief Judge.

Dated: January 30, 1957.

APPENDIX B

JUDGMENT OF THE COURT OF APPEALS AND OPINION OF COURT OF APPEALS DENYING REHEARING

JUDGMENT

(Cases Nos. 13,209 and 13,210)

Filed October 31, 1957

The above cause coming on to be heard upon the transcript of the record, the briefs of the parties, and the argument of counsel in open court, and the court being duly advised,

Now, therefore, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and is hereby affirmed for the reasons set forth in the findings of fact and conclusions of law of Judge Lederle.

OPINION

Nos. 13209-13210

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13209

NATIONAL BANK OF DETROIT, DEFENDANT-APPELLANT,

v.

THE WAYNE OAKLAND BANK, PLAINTIFF-APPELLEE.

No. 13210

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY, DEFENDANT-APPELLANT,

v.

THE WAYNE OAKLAND BANK, PLAINTIFF-APPELLEE.

Decided February 25, 1958

OPINION DENYING REHEARING

Before ALLEN, MARTIN, and MCALLISTER, Circuit Judges.

PER CURIAM. Appellants, National Bank of Detroit and Ray M. Gidney, Comptroller of the Currency, filed their petitions for rehearing en banc of the above cause, in which

this court affirmed the judgment of the district court on the findings of fact and conclusions of law of Judge Ledèrle.

On the petitions for rehearing, appellants submit that this court did not pass upon the legality and efficacy of the Comptroller's approval of the application of the National Bank of Detroit for permission to establish and operate a branch bank; that the approval, alone, of the Comptroller was sufficient to give the right to establish and operate the bank; that the judgment of the district court, as affirmed, is at odds with the authoritative interpretation of the law of the State of Michigan; and that appellee had "no standing" to bring the action. Most of the points set forth in the two petitions for rehearing en banc were the subject of considerable interrogation of counsel during argument and extensive discussion by the members of this court during the hearing, and all of the matters set forth in the briefs were determined adversely to appellants' contentions. Nevertheless, it has been thought proper to outline the grounds upon which the judgment was affirmed, with reference to the statements in the petition for rehearing.

It appears, then, that The Wayne Oakland Bank, a state bank organized under the laws of Michigan, filed an application, on April 27, 1955, with the Michigan State Banking Commissioner to secure his approval to the establishment of a branch bank in the City of Troy, Michigan. On April 2, 1956, with the approval of the Commissioner, The Wayne Oakland Bank established a branch in Troy. At that time, no other bank had been established in that city.

On January 19, 1956, the National Bank of Detroit applied to the Comptroller of the Currency of the United States for permission to establish a branch at Troy; and on March 19, 1956, the Comptroller notified the National Bank of Detroit that its application had been approved. At the same time, the Comptroller sent a letter to the Michigan State Banking Commissioner, stating that he had approved the application of the National Bank of Detroit to establish a branch in Troy, Michigan.

The Wayne Oakland Bank in this case sought a declaratory judgment that it would be unlawful for the National Bank of Detroit to open a branch bank in Troy, after The Wayne Oakland Bank had established its branch there; and it further sought a restraining order to prevent the Comptroller from issuing a certificate of authority to the National Bank of Detroit, as well as an order restraining the latter from establishing and operating such a branch.

The district court held that, since The Wayne Oakland Bank had already opened, and had in operation, a branch in Troy, the subsequent establishment in the same city of a branch of another bank, such as the National Bank of Detroit, which was chartered to do business in another city, was prohibited by Title 12 U.S.C.A., Section 36, and Section 23.762 of the Michigan Statutes Annotated, and, accordingly, the district court issued the restraining orders sought, against the Comptroller, and the National Bank of Detroit.

We are of the opinion that, contrary to the contentions of the appellants, the Michigan statute (17 M. S. A., Section 23.762)[1] is here controlling; that the limitation therein contained as to branch banks applies, not only to state banks, but to national banks as well; and that Title 12 U. S. C. A., Section 36,[2] not only did not empower the Comptroller to establish a branch of the National Bank of Detroit in Troy, Michigan, subsequent to the establishment in that city of a branch of The Wayne Oakland Bank, but, by clear implication, prohibited him from doing so.

Appellants contend that, by Title 12 U. S. C. A., Section

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[1] "Sec. 34. Any bank having a capital of at least $50,000.00 may, with the written approval of the commission, establish and operate a branch or branches within a village or city other than that in which it was originally chartered: *Provided*, That the village or city in which it is proposed to establish and operate a branch is located in the same county in which the parent bank has its principal office or, if not in said county, then within 25 miles of said parent bank or in a contiguous county at a point more than 25 miles from the parent bank, if such county has no bank: *Provided further*, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation: . . ."

[2] "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . . at any point within the state in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the state in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the state on State banks."

36(c), the National Bank of Detroit was permitted to establish the branch in Troy, Michigan, after The Wayne Oakland Bank had already opened a bank there with the approval of the Michigan State Banking Commissioner. The claim of the National Bank of Detroit is based upon the argument that Congress intended to permit a national bank to establish a branch at any point within the state at which the state law permitted the establishment and operation of a branch of a state bank, and that, since The Wayne Oakland Bank had established a branch in Troy, by authority of the State Banking Commissioner, the National Bank of Detroit could, therefore, establish a branch in the same city.

The history of federal legislation regarding branch banking and the statutes applying thereto leaves a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a national bank was to be permitted to establish and operate a branch in a state only at such a point as it could, by express provisions of a state statute, establish and operate a branch if it were then a state bank. In spite of recommendations to Congress of the Comptroller of the Currency in 1922, 1923, 1924, and 1925, for laws granting national banks the privileges enjoyed in each state by state banks, Congress declined to enact such legislation. In 1927, Congress amended the banking statute and granted national banks the right to establish and operate branches, if such establishment and operation were, at the time, permitted to state banks by the laws of the state in question (Public Law No. 639, Sixty-ninth Congress.) Later, in 1929, 1930, and 1931, similar proposals were made by the Comptroller. In 1932, the same recommendations were made, and the passage of a bill authorizing "national banks to establish branches at any place within the State in which such banks are located" was recommended by a majority of the Senate Committee on Banking and Currency. A minority report disagreed on this question of branch banking; and the bill failed of passage. In 1933, Congress finally passed the act containing 12 U. S. C. A. 36 in its present form,[3] insofar as here pertinent.

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[3] See footnote 2, ante.

The foregoing statute provides that a national bank may, "with the approval of the Comptroller of the Currency, establish and operate new branches: . . . at any point within the state in which said [bank] is situated, if such establishment and operation are *at the time* authorized to State banks by the statute law of the state in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the state on State banks." (Emphasis supplied) In our view, the meaning of the foregoing statutory provision is that a national bank shall be permitted to establish an outside branch in a city if state law permits a state bank to establish and operate an outside bank, *at the time*, in the same city. If there were no other bank operating in Troy, the establishment of a state or national bank would, at that time, be permitted. In this case, however, there was already a branch of a state bank permitted by state law and established in the city of Troy. The Michigan statute[4] provided that, under the circumstances of this case, "no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation." From the above, the conclusion follows that (1) the National Bank of Detroit could not, even with the approval of the Comptroller of the Currency, establish a branch in Troy, since the establishment of such a branch would not have been authorized, at the time, to state banks by the laws of Michigan by language specifically granting such authorizations affirmatively; and (2) that, since the branch of The Wayne Oakland Bank was established in Troy on April 2, 1956, no other branch could be established subsequent to that date by any other state or national bank. Appellants' claim that this conclusion results in discrimination against national banks seems irrelevant in the light of the statutes themselves. But to the contention that this discriminates against national banks in those cities where a state bank is the first to establish a branch, it can equally be said that the same discrimination operates against a state bank when a national bank is the first to establish a branch.

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[4] Section 487.34, Compiled Laws of Michigan, 1948 (Section 23.762, Michigan Statutes Annotated, as amended, 1955 Cumulative Supplement.

In view of our determination as above set forth, it is not of controlling importance whether the Comptroller approved the application of the National Bank of Detroit, or not. But since much has been made of the claimed conclusive effect of the Comptroller's approval, a discussion of this aspect of the case seems proper, and, in this regard, a reference to the record is helpful.

It is undisputed that there was a working arrangement between the Comptroller of the Currency and the Michigan State Banking Commissioner, to the effect that the Comptroller would always notify the State Banking Commissioner of any application by a national bank for the opening of a branch, in the State of Michigan. Obviously, this was to avoid the Comptroller's approval of a branch of a national bank in a city in Michigan in which a state bank or its branch was already established or had been approved by the Michigan State Banking Commissioner.

In this case, there was a deviation from this established practice. This deviation from the established practice of the Comptroller resulted from a meeting that took place when the officers and attorneys of the National Bank of Detroit, on February 3, 1956, went to Washington to have a conference on the matter with the officials of the Office of the Comptroller of the Currency. A memorandum of this conference, which was verified under oath by the Comptroller, appears in the evidence, and sets forth that the conference related to the application of the National Bank of Detroit to establish a branch in the city of Troy, Michigan. The memorandum went on to say that in June 1955, The Wayne Oakland Bank had already received permission to establish a branch in Troy, from the Michigan State Banking Commissioner; that, "due to the provisions of the Michigan statute limiting the establishment of branches, once a branch operation is commenced in Troy, no other outside bank could establish a branch there. Bank's counsel advised that, prior to that time, however, there is no legal obstacle to the granting of permission to establish a branch. . . . The [attorneys and officers of the National Bank of Detroit] believe that there is sufficient business in Troy to warrant the successful operation of two branches, and further, do not believe that the establishment of a branch of their bank would be unfair to

The Wayne Oakland Bank as they are not asking to keep another bank out of an area but are only asking that they themselves be let in to compete and protect existing business." Further continuing, the memorandum states: "Upon questioning . . . as to why the subject bank delayed so long in making application for a branch in Troy when it was known that Wayne Oakland Bank had received permisssion to establish a bank there last June, Mr. Bodman [General Vice President of the National Bank of Detroit] stated that recently it had been reported that the Detroit Wabeek Bank & Trust Company (H. O., Detroit, with branches at Birmingham and Ferndale), the Birmingham (Michigan) National Bank, and the Ferndale (Michigan) National Bank are to be consolidated into the Detroit Bank, which is the second largest bank in Detroit. It was this that precipitated the subject bank's application, as such a consolidation would change the nature of the competition in the subject area. Competition from The Wayne Oakland Bank was not considered serious, but if the Detroit Bank is able to place four offices within the area, as it would in the rumored consolidation, the [attorneys and officers] believed this proposed bank would be necessary to enable them to maintain their competitive position. The [attorneys and officers of the National Bank of Detroit] presented the formal application for the . . . branches, and requested that, regarding the one in Troy, that it be kept on a confidential basis and that we do not notify Commissioner Eveland, or contact any of the competing banks. The reason for the request was that the [attorneys and officers] were fearful of a leak through the State Commissioner's Office that the bank was after a branch, which would cause The Wayne Oakland Bank to hasten to open in temporary quarters in an attempt to legally block this application. The [attorneys and officers of the National Bank of Detroit] were informed that not to notify Commissioner Eveland of this application would be a deviation from our present working agreement with his office. Mr. Gidney [the Comptroller of the Currency] said that we would have an examiner make this investigation to determine the need for a branch and would instruct him to keep the investigation on a confidential basis. . . . It was understood that we would not contact Commissioner Eveland's office at this time. Accompanying this memorandum are

formal requests, with related data and maps, covering the . . . applications to establish branches. It is understood that all investigations relative thereto, except the one in the city of Troy, are to be processed in the customary manner. As stated above, it is to be suggested to District Chief Examiner Rush that Examiner Flynn be assigned that investigation and that it should be conducted in a confidential manner."

About three weeks after the above conference, the vice president of the National Bank of Detroit wrote the Deputy Comptroller of the Currency, stating that, while the Comptroller's approval of the bank's application would have to be unconditional to be effective, the bank agreed that it would not open the branch in Troy unless the merger, discussed in the conference, was completed. On March 19, 1956, the Deputy Comptroller wrote the vice president of the National Bank of Detroit, stating that its application for permission to establish the branch in Troy was on that day approved. The letter went on to request that the bank advise the Comptroller when a definite opening date for the actual transaction of business had been decided upon; and what the exact street address would be, as well as the popular name by which the branch would be known. The letter continued: "The Comptroller's certificate authorizing establishment of the branch will be issued when that information has been received. It is understood, of course, that the branch should not be open until the certificate has been issued." Later, in April, 1956, when The Wayne Oakland Bank threatened the National Bank of Detroit with a lawsuit to prevent the opening by the latter of a branch bank, the vice president of the National Bank of Detroit, in a conference between the officers of the two banks and their attorneys, assured those present that the National Bank of Detroit would not open the branch in Troy, if the merger plans were not completed.

On May 29, 1956, the attorney for The Wayne Oakland Bank, in a conference with the Comptroller of the Currency in Washington, protested the latter's action regarding the National Bank of Detroit; and, in response, the Comptroller informed him that he had approved the branch on March 19, 1956; that his approval constituted an irrevocable commitment to the National Bank of Detroit authorizing the branch; and that a certificate would later be issued as a matter of course.

As late, however, as June 14, 1956, more than six weeks after The Wayne Oakland Bank had opened its branch in Troy, the representatives of the National Bank of Detroit were advising the president of The Wayne Oakland Bank that it would not open a branch in Troy if the proposed merger were not consummated.

It is the contention of appellants that when the Comptroller notifies a national bank that he approves an application for permission to establish a branch, that notification is alone sufficient to constitute the statutory approval required by Title 12 U. S. C. A. 36(c); and that it makes no difference whether such a branch is not opened, or is not ready to be opened, at the time the bank received such notification, or whether the bank seeking such approval does not intend to open the branch, except on certain contingencies, and so notifies the Comptroller at the time that it seeks his approval. Moreover, although the notification of approval by the Comptroller, in the instant case, was by letter, we assume, in the light of appellants' argument that their contention would be that it is immaterial whether such approval is by letter, telegram, or telephone.

The approval and consent of the Comptroller of the Currency are, by his Regulations, evidenced by a formal certificate. 12 Code of Federal Regulations, Section 4.5(a)(3), promulgated under Title 12 U. S. C. A., Section 1, provides:

> "If the decision is unfavorable, the applicant bank is so notified. If the decision is favorable the Comptroller issues a formal certificate evidencing his approval and consent to the establishment and operation of a branch bank at the designated location."

No certificate of the Comptroller was issued in this case prior to the opening of The Wayne Oakland Branch in Troy. The Comptroller informed the National Bank of Detroit that the branch should not open until the certificate was issued.

Since the only legal way in which the Commissioner's [sic] approval is evidenced is by his certificate, the branch of the National Bank of Detroit could not be said to be approved until the certificate was issued. A nod, a conversation, a telephonic communication, a telegram, or a letter does not suffice for the approval of the Comptroller, within the meaning of the statute.

Since there was no approval by the Comptroller of the application by the National Bank of Detroit, for the branch bank, within the intendment of the statute, there cannot be said to be any "establishment" of such branch within the statutory meaning of the term. The claimed finding of fact of the district court that the Comptroller had approved the application is accordingly, of no consequence. In this regard, it is to be said that the district court found that the Comptroller had notified the National Bank of Detroit that its application had been approved, and stated that a certificate would be issued when he received further information. In any event, since no certificate had been issued, the matter is not important, in our view of the case.

All of the foregoing would seem to demonstrate the wisdom of cooperation between the state and federal banking authorities in matters affecting the approval, and the establishment, of state and national banks. Such cooperation appears to have been intended by Congress, and in this case, by the Michigan legislature. The express provisions of the federal statute governing the establishment and operation of national banks look to what has been done by the state; and the express provisions of the state statute look to what has been done by the federal government. This accounts for the fact that there was a working agreement between the Comptroller of the Currency and the Michigan State Banking Commissioner to the effect that the Comptroller would always notify the State Banking Commissioner of any application by a national bank for the opening of a branch in the State of Michigan in order to avoid the Comptroller's approval of a branch of a national bank in a city in Michigan in which a state bank or its branch was already established, or had been approved by the Michigan State Banking Commissioner.

It was the deviation by the national banking authorities from this established practice, at the request of the officers and legal counsel of the National Bank of Detroit that the Comptroller keep that Bank's application for a branch confidential and secret from the Michigan State Banking Commissioner, which resulted in the conflict in this case between the state and national banking authorities.

Appellants submit an opinion of a former Attorney General of Michigan as being authoritative in these proceedings, and contrary to the foregoing conclusions. If so, we are not persuaded by the views therein set forth:

and it is to be remarked that the Michigan State Banking Commissioner has declined to follow such opinion in the official conduct of his office. Nor do we consider that the case of *Muskegon Traction & Lighting Co. v. City of Muskegon*, 167 Mich. 331, supports appellants' contentions herein, that the branch of the National Bank of Detroit had been "established" by the letter of approval of the Comptroller prior to the opening of the branch of The Wayne Oakland Bank in Troy.

As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition which was prohibited by the federal statutes subjecting national banks to the same rules of law as cover state banks. The district court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated.

With regard to rehearings en banc, where the appeal is decided by a regular court of appeals, consisting of three judges only, a petition to rehear will not be considered by the court en banc. *N. L. R. B. v. Cambria Clay Products Co.*, 229 Fed. 2d 433 (C.A. 6); *Northwest Airlines, Inc., et al. v. Glenn L. Martin Co.*, 229 Fed. 2d 434 (C.A. 6).

In accordance with the foregoing views, the petitions for rehearing are denied.

APPENDIX C

STATUS OF BRANCH BANKING IN THE VARIOUS STATES AND EXCERPTS FROM STATE STATUTES

I

The following states specifically authorize the establishment and operation of branches by State banks and contain no restrictions as to geographic location:

Arizona
California
Connecticut
Delaware
Idaho
Louisiana
Maine
Maryland
Nevada
North Carolina
Oregon
Rhode Island
South Carolina
South Dakota
Vermont
Washington

II

The following states and territories also specifically and affirmatively authorize branch banking by State banks but limit "as to location" the establishment and operation of such branches:

Alabama
Arkansas
Georgia
Indiana
Iowa
Kentucky
Massachusetts
Michigan
Mississippi
New Jersey
New Mexico
New York
North Dakota
Ohio
Pennsylvania
Tennessee

Utah
Virginia
Alaska
Hawaii

III

The following states specifically prohibit the establishment and operation of branches by State banks:

Colorado
Florida
Illinois
Kansas
Minnesota
Missouri
Montana
Nebraska
Texas
West Virginia
Wisconsin

IV

The following states have no legislation which specifically and affirmatively authorizes the establishment and operation of branches by State banks:

New Hampshire
Oklahoma
Wyoming

There are set forth below statutes of states and territories listed under categories I and II above, in which there are found the restrictions "as to location" of states listed in category II, as well as restrictions other than those upon location contained in the statutes of the states in both categories I and II:

ALABAMA.

Acts of Alabama, 1953, 1955

Counties 135,000 to 225,000 population.—. . . any state bank, . . . shall have the power to establish, maintain and operate within the limits of the city, town, or village wherein the principal place of business of such bank is situated, one or more branches, . . . Act No. 16, 1953 Acts, p. 21.

Counties 74,000 to 93,000 population.—. . . Any bank, . . . shall have power to establish, maintain and operate within the limits of the county, wherein the principal place of business of such bank is situated, one or more branch

banks, branch offices, branch agencies, . . . Act No. 387, 1953 Acts, p. 461.

Counties 400,000 or more population.—". . . That from and after the approval of this Act any state bank, . . . shall have power to establish, maintain and operate, within the limits of the county wherein the principal place of business of such bank is situated, one or more branch banks, . . . Act No. 485, 1953 Acts, p. 613.

". . . before the establishment of any such branch or branches, [shall] first secure the written consent thereto of the State Superintendent of Banks." Act No. 485, 1953 Acts, p. 613.

Arizona

2 Arizona Revised Statutes Anno. 1956

Branches permitted.—The superintendent of banks, upon receipt of a written application "for leave to open a branch office" from a commercial bank, savings bank or trust company, "shall investigate and ascertain whether the public convenience and advantage will be promoted by opening the branch office . . . If satisfied that granting the application is expedient and desirable, he shall make a certificate . . . authorizing the opening of the branch office. . . ." Sec. 51-208.

Arkansas

Arkansas Statutes Anno. 1947

". . . no banking institution may establish any office beyond those counties contiguous to the county in which said banking institution is located. . . . Sec. 67-319.

". . . no teller's window branch of any bank shall be placed in any incorporated town where a 'cooperative bank' is now in existence, in the event a majority of the real property owners within the incorporated limits of such town or city shall protest by petition the State Banking Department granting its permission to place such teller's window in such city or town." Sec. 64-1521.

California

Deering's California Codes, Financial Code Annotated

"*Investigation and examination.* Upon the filing of an application the superintendent shall make or cause to be made a careful investigation and examination relative to the following:

"(b) The need for banking or trust facilities or additional banking or trust facilities, as the case may be, in the community where the proposed bank or trust company is to be located, giving particular consideration to the adequacy of existing banking or trust facilities and the need for further banking or trust facilities in the locality.

"(c) The ability of the community to support the proposed bank or trust company giving consideration to (1) the competition offered by existing banks or trust companies and other financial institutions; (2) the previous banking history of the community; (3) the opportunities for profitable employment of bank funds as indicated by the average demand for credit, the number of potential depositors, the volume of bank transactions, and the business and industries of the community with particular regard to their stability, diversification and size; and (4) as to trust companies, the opportunities for profitable employment of fiduciary services.

"(f) Such other facts and circumstances bearing on the proposed bank or trust company and its relation to the locality as in the opinion of the superintendent may be relevant." Sec. 361. [These general requirements apply to the establishment of parent banks and are made applicable to branch banks by Sec. 503.]

Delaware

2 Delaware Code Anno. Tit. 5

Branches permitted. "(a) Any bank or trust company if authorized by its charter, may open a branch office or place of business, or branch offices or places of business in this State, upon application submitted to and approved by the Board of Bank Incorporation and upon the issuance of a certificate of authority of the State Bank Commissioner. The application shall state the exact location of the intended branch office and the necessity for its opening and the Board shall inquire into the matter, and if it deems that the public convenience will be served thereby and that there is good and sufficient reason that the corporation should have the branch office, the Board shall issue its written permission for the opening of the branch office. . . ." 770–(1956 Supp.).

IDAHO

5 Idaho Code

Branches permitted.—"No bank shall maintain any branch bank office except as hereinafter provided. Any corporation organized under the laws of Idaho and authorized to engage in the banking and or trust business may, with the approval of the commissioner of finance, establish and operate branch banking offices for the transaction of its business within the limits of the city, town, or village, in which it is situated, or at any point within this state: * * *. Branch banking offices shall not be established in any city, town, or village, in which there is located a bank or banks, State or national, regularly transacting a customary banking business unless the corporation establishing such branch banking office shall take over an existing bank, or obtain consent of all banks there located. . . ." Sec. 26-1001.

INDIANA

5 Burns Indiana Statutes Anno.

"*Branch banks.* Except as hereinafter otherwise provided, any bank or trust company may open or establish a branch bank in any city or town within the limits of the county in which the principal office of such bank or trust company is located, if there is no bank or trust company located in such city or town.

"No branch bank shall be opened or established without first having obtained the written approval of the department. * * * Before the department shall approve or disapprove any application for the establishment of a branch bank, as herein authorized, it shall ascertain and determine to its satisfaction that the public convenience and advantage will be subserved and promoted . . .; and that the welfare of any other bank already established in such city will not be jeopardized." Sec. 18-1707 (1957 Supp.).

IOWA

Code of Iowa, 1946

Branches prohibited but limited "offices" permitted.—"No banking institution may establish any office beyond

those counties contiguous to the county in which said banking institution is located nor in a city or town in which there is already an established banking institution." . . . Sec. 528.51.

KENTUCKY

Baldwin's Kentucky Statutes, 1955

"Before the commissioner of banking shall approve or disapprove any application made under this paragraph he shall ascertain and determine that the public convenience and advantage will be served and prompted thereby and that there is reasonable probability of the successful operation of such branch. No such branch shall be authorized or approved by the commissioner unless all of the following are complied with:

"(a) No such corporation having a combined capital and surplus of less than $100,000 shall be permitted to establish any branch. Any corporation applying for permission to establish a branch shall be required to have a minimum combined capital and surplus for each branch applied for in accordance with the following table: [table omitted]." Sec. 287.180.

"(b) No such corporation shall be permitted to establish a branch in any incorporated city (other than in the city in which its principal office is located) in which there is an existing bank. Nor shall any such corporation be permitted to establish a branch in any unincorporated area within a radius of one mile of an existing bank located in such unincorporated area. As used in this paragraph an 'existing bank' shall mean the principal office of a bank as distinguished from a branch thereof." Sec. 287.180

LOUISIANA

Louisiana Revised Statutes, 1950

"*Certificate of Authority; subscribed capital; payment.*—No banking association shall commence business or open branch offices until it has procured from the commissioner a certificate of authority, which shall not be granted until the association has furnished to him satisfactory proof that it has complied with all requirements concerning the adoption and recordation of its charter and that one-half of the subscribed capital has been paid up in lawful money

The remainder of the subscribed capital shall be paid up within ninety days after the banking association has opened its doors for business.

. . . .

"Before issuing a certificate of authority to any banking association or savings bank, the commissioner shall examine the qualifications, responsibility, and standing of the persons organizing the association or bank. If he finds that the public interest will not be subserved by permitting such persons to organize the association or bank, he shall refuse to issue the certificate." Sec. 6:241.

MAINE

Ch. 59, Revised Statutes of Maine, 1954, as amended in 1955

Branches permitted.—"A savings bank may open and conduct branches in the city or town where its main business is located and in other cities or towns in the county of its location, or the adjoining counties; provided that before opening a branch in any other city or town, it shall have received a warrant to do so from the bank commissioner, who shall issue such warrant only when satisfied that public convenience and advantage will be promoted by the establishment of such a branch. . . . The right to open a branch shall lapse at the end of 1 year . . . unless it shall have been opened and business actually begun in good faith. . . . Any such branch may be closed or discontinued with the consent of the commissioner, after such notice and hearing, if any, as in his judgment the public interest may require." Sec. 19-C (1957 Supp.).

MARYLAND

Annotated Code of Maryland, 1957, Art. 11 —

Banks and trust companies.—"Any bank or trust company organized under the laws of this State, is specifically granted the power and authority to establish and operate a branch or branches in the city or county in which it is located or at any point within the State, after having first obtained the approval of the Bank Commissioner, which approval may be given or withheld in his discretion,

and shall not be given until he shall have ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of any such branch or branches, and that said bank or trust company has complied with the other terms and conditions prescribed by this article. . . . ." Sec. 65.

Massachusetts

5A Annotated Laws of Massachusetts

Savings banks.—"After such notice and hearing as the commissioner may require and with his written permission and under such conditions as he may approve, such corporation may establish and maintain one or more branch offices or depots (a) in the town wherein its main office is located, or (b) in other towns within the same county; provided that no branch office or depot shall be established in such other town if the main office or a branch office of any savings bank is located therein.". Sec. 5, ch. 168 (1957 Supp.)

"No such corporation and no person in its behalf shall, except as provided in sections twenty-three and twenty-four, receive a deposit other than at the main office or at a branch office or depot, or pay a deposit other than at the main office or at a branch office.

"Collections of sums due or payable to such corporation upon mortgage loans or other indebtedness may be made for its account, by trust companies or national banking associations or by duly authorized officers, employees or attorneys of such corporation. Collections of such sums by agents of such corporation other than the foregoing, shall be subject to such conditions, if any, as may be prescribed by the commissioner, except that mortgage servicing contractors shall be subject to the provisions of paragraph 5 of section thirty-six. Such corporation at its main office or at any branch office may, for the account of any utility company, collect payments on bills representing indebtedness thereto:" Sec. 6, Ch. 168 (1957 Supp.).

Co-operative banks.—". . . may establish one or more branch offices in the town wherein its main banking office is located or in other towns within the same county having no co-operative banking facilities. . . . ." Sec. 12, ch. 170 (1957 Supp.).

Trust Companies.—"Any such corporation may, with the approval of the board of bank incorporation, establish and operate one or more branch offices in the town where its main office is located, or in any other town within the same county having no commercial banking facilities or having banking facilities which, in the opinion of said board, are inadequate for the public convenience. . . ." Ch. 172, Sec. 45.

Banking companies.—"The board may authorize any such corporation to establish and operate one or more branch offices in the city or town in which it is authorized to do business under this chapter or in any other city or town within the same county. . . ." Ch. 172A, Sec. 12.

MICHIGAN

17 Michigan Statutes Anno.

"Any bank having a capital of at least $50,000.00 may, with the written approval of the commission, establish and operate a branch or branches within a village or city other than that in which it was originally chartered: *Provided*, That the village or city in which it is proposed to establish and operate a branch is located in the same county in which the parent bank has its principal office, or, if not in said county, then within 25 miles of said parent bank or in a contiguous county at a point more than 25 miles from the parent bank, if such county has no bank: *Provided further*, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation:

Provided further, That the commission shall not grant such approval unless the parent bank has capital and surplus in an amount at least equal to the aggregate minimum capital and surplus, respectively, required for the establishment of a bank in each of the various places where such bank and its branches are to be located and unless the commission is satisfied as to the sufficiency of the capital and surplus of the bank, the necessity for the establishment of such branch or branches and the prospects of successful operation if established." Sec. 23.762 (1957 Rev. Vol.).

Mississippi

Mississippi Code, 1942, Anno.

"Branch banks may be established within a radius of one hundred miles of the parent bank provided that no parent bank shall be permitted to establish more than fifteen branch banks; provided further that no parent bank shall be permitted to establish a branch bank in any town or city of less than 3,100 population according to the last preceding Federal census where such town or city has one or more banks in operation." Sec. 5229, Mississippi Code Anno., 1942.

Other branch banking provisions.—"No branch bank in this State may be discontinued or abandoned without the consent in writing of the State Comptroller first obtained. By and with such consent first obtained, branch banks may be moved from one municipality to another within the territorial restriction provided in this Act . . . ." Sec. 5232.

There are also provisions providing for: fee of $50.00 for each application; issue of stock upon annexation of a unit bank as a branch; the formulation by the State comptroller of rules and regulations for the examination of branch bank systems; and stating what shall be included in the name of the branch bank. Secs. 5226, 5227, 5231, 5233.

New Jersey

17 New Jersey Statutes Anno.

"B. No bank or savings bank shall establish or maintain a branch office which is located outside the municipality in which it maintains its principal office; except that a bank or savings bank may establish and maintain a branch office or offices anywhere in the same county as that in which it maintains its principal office * * *" Sec. 17:9A-19 (1957 Supp.).

"Before any branch office shall be established, except those branches established pursuant to paragraph (1) of subsection B of section 19 [Sec. 17: 9A-19], the bank or savings bank shall file written application in the department for the commissioner's approval thereof. If, after such investigation or hearings, or both, as the commissioner may determine to be advisable, he shall find

"(1) that the bank or savings bank has complied with the requirements of section 19."

"(2) that the interests of the public will be served to advantage by the establishment of such branch office, and

"(3) that conditions in the locality in which the proposed branch office is to be established afford reasonable promise of successful operation, the commissioner shall, within ninety days after the filing of the application, approve such application." Sec. 17:9A-20.

New Mexico

7 New Mexico Stat. 1953, Anno.

"Branches or banks authorized under the provisions hereof . . . must be located in the same county in which said bank is located, in an adjoining county if there be no bank in operation in such adjoining county, or within a radius of one hundred miles from said bank if there be no bank in operation in the county in which such branch is opened; . . .". Sec. 48-2-17.

"Upon the examination of any bank by the state bank examiner as provided by law, each branch of such bank shall be examined, for which such bank shall pay a fee of fifty dollars ($50.00) for each branch so examined, said fee to be paid to the state treasurer and deposited in the general fund." Sec. 48-2-18 (1957 Supp.).

New York

Book 4, McKinney's Consolidated Laws of New York Anno., Banking Law

"If the superintendent shall not find that the public convenience and advantage will be promoted by the opening of such branch office or if the applicant has not the requisite amount of capital stock or if three-fifths of the members of the board shall not vote for approval of such application, the superintendent shall notify the applicant that its application has been denied." Sec. 29 (1957 Supp.).

"1. (b) A bank or trust company may open and occupy a branch office or branch offices in any city or village located in the banking district in which is located its principal office, provided in no event shall a branch be opened and occupied pursuant to this paragraph (b) in a city or village in which is already located the principal office of another bank, trust company or national banking association, except for the purpose of acquiring by merger, sale or otherwise the

business and property of a bank, trust company or national banking association, whether in liquidation or doing business in the usual course. * * * Sec. 105.

North Carolina

2B General Statutes of North Carolina

Branches permitted.—"Any bank doing business under this chapter may establish branches in the cities in which they are located, or elsewhere, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks, in his discretion, and shall not be given until he shall have ascertained to his satisfaction that the probable volume of business and reasonable public demand in such community is sufficient to assure and maintain the solvency of said branch and of the existing bank or banks in said community. Such branch banks shall be operated as branches of and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier and such other officers as may be required to properly conduct the business of such branch, and a board of managers or loan committee shall be responsible for the conduct and management of said branch, but not of the parent bank or of any branch save that of which they are officers, managers, or committee: * * *." Sec. 53-62 (1957 Supp.).

North Dakota

North Dakota Revised Code of 1943

Branches prohibited but limited "stations" permitted.—After applying for and receiving permission from the State Banking Board, "Any banking institution may establish and maintain within the county in which the home office of the applicant . . . is located, or in any adjoining county, . . . a receiving and paying station in any community not having an established banking institution . . . . This section shall not be construed as committing this state in any manner to a policy of permitting branch banking." Sec. 6-0314.

Other branch banking provisions.—The application for permission to establish a station shall be made "in such manner and form" as the board shall prescribe, "giv-

ing such information as the board may require. . . ." At the time such application is filed, the applicant shall "pay to the board such sum as it may designate, not exceeding the sum of twenty-five dollars, to defray the cost of investigation by the board."

After the requirements above have been fulfilled, the board shall "make an investigation . . . and may issue a permit for the establishment and maintenance of such station if it shall find that public convenience and advantage will be prompted thereby and that the capital of the applicant bank is unimpaired and its management good." No permit shall be granted until "all banking institutions within a radius of fifteen miles of the proposed situs," of any such station are given at least thirty days notice and an opportunity to be heard. If the hearing indicates "that a banking institution other than the applicant is located more favorably and can render better service to the community, the board may grant the most favorably located institution the right to establish the station." Sec. 6-0315-16.

Ohio

Page's Ohio Revised Code Anno., Tit. 11

Limited branch banking permitted.—"[N]o bank shall establish a branch bank in any place other than that designated in its articles of incorporation, except in a municipal corporation contiguous to such designated place, or in other parts of the county in which the municipal corporation containing the main bank is located, provided any bank may maintain and operate as a branch bank a bank located in a county which is contiguous to the county in which the municipal corporation containing the main bank is located, and which on January 1, 1935, and prior thereto, bore to the main bank the relationship of 'affiliate' within the meaning of that term as it is used in 'The Banking Act of 1933' and the amendments thereto." Sec. 1103.09.

"In addition to the approval of the superintendent of banks required under section 1103.31 of the Revised Code, no such bank shall change the place where its principal business is transacted to another municipal corporation without a finding first made by the banking advisory board that the best interests of the public will be promoted by said change and that there are not adequate banking facili-

ties existing in the municipal corporation to which such change of location is to be made." Sec. 1103.12.

OREGON

5 Oregon Revised Statutes, Ch. 714

"*Application for permission to establish branch.*—Before any branch is established, the board of directors of any bank or trust company desiring to establish such branch shall make application therefor to the Superintendent of Banks. The application shall be filed and shall be investigated and approved or disapproved by the Superintendent of Banks, and shall be subject to appeal to the State Banking Board, all in the same manner as is provided in the case of the organization of a bank or trust company. No bank or trust company shall establish or operate any branch or branches without first receiving the written approval of the Superintendent of Banks. The fee for filing the application is $50." Sec. 714.040.

PENNSYLVANIA

Purdon's Pennsylvania Statutes, Anno., Tit. 7

"B. Any institution, pursuant to a resolution of its board of directors, its trustees or, in the case of a private bank, its owners or board of managers, may establish and maintain branches—(1) with the prior written approval of the department in the same city, borough or village in which the principal place of business of the institution proposing to take such action is located; and (2) with the approval of the department and the Banking Board in any other city, borough or village or any place in a township other than a village, located in the same county or in a county contiguous to the county in which the principal place of business of the institution proposing to take such action is located.

"When an institution files an application for the establishment of a branch in the same city, borough or village in which its principal place of business is located, the department, if it finds upon investigation that there is a need for banking services or facilities such as are contemplated by the establishment of such branch and that all other re-

quirements of this section have been met, shall approve the application and issue a letter of authority to the applicant institution. Sec. 819-204.1 (1957 Supp.).

South Carolina

1 Code of Laws of South Carolina 1952

Branches permitted.—"No bank or building and loan association shall be granted a charter by the Secretary of State unless and until the Board [of Bank Control] has approved the application therefor in writing. No branch bank or branch building and loan association shall be established without the approval in writing of the Board. Before any such application for the incorporation of a bank or building and loan association or the establishment of a branch thereof shall be approved, the Board shall make an investigation to determine whether or not the applicants have complied with all the provisions of law; whether, in the judgment of the Board, they are qualified to operate such an institution and whether the establishment of such bank or building and loan association or of such branch thereof would serve the public interest, taking into consideration local circumstances and conditions at the place where such bank, building and loan association or branch thereof proposes to do business." Sec. 8-57 (1957 Supp.).

"Every branch bank shall indicate on its stationery, checks, drafts, notes, signs, advertisements and publications that it is a branch bank and show the name and place of business of the parent bank." Sec. 8-106.

South Dakota

Session Laws of South Dakota, 1957

Branches permitted.—"A branch office or a branch bank may be conducted by a bank only with the permission of the Commission under such rules and regulations as the Commission shall prescribe, and such permission to be in the sole discretion of the Commission. No branch office shall be operated in any city or town after any state or national bank has received authority to operate in such town or city. Only one branch office shall be established in any town or city. * * *" Ch. 11, p. 42.

TENNESSEE

8 Tenn. Code Anno., 1955

Branches in county permitted.—"No corporation, firm, or individual, shall create and operate any branch bank, office, or agency, for the purpose of receiving deposits, paying checks, making loans, or receiving or discounting bills or notes in any place whatsoever other than the county wherein its principal office is located and its principal banking business is carried on. No branch bank shall be established until approved by the superintendent of banks. In event the application to open a branch bank is disapproved and the applicants feel aggrieved, they may have a review by certiorari as provided by §§ 27-901—27-913. . . ." Sec. 45-211.

UTAH

1 Utah Code Anno., 1953

"All banking houses and branches shall be located either within the corporate limits of a city or town, or within unincorporated areas of a county in which a city of the first class is located.

"Any bank desiring to establish one or more branches or offices shall file a written application therefor in such form and containing such information as the bank commissioner may require. No bank shall be permitted to establish any branch or office until it shall first have been shown to the satisfaction of the bank commissioner and the governor that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office and the bank commissioner may by order permitting the establishment of such branch or office designate and limit the character of work and service which may therein be performed.

"No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof."

"Any corporation or office thereof violating any of the provisions of this section is guilty of a misdemeanor." Sec. 7-3-6 (1957 Supp.).

VERMONT

Vermont Statutes, Revision of 1947, Tit. 42

"Before a savings bank, trust company or a savings bank and trust company opens an agency or branch of such corporation it shall petition the commissioner to hold a public hearing in the town where the proposed agency is to be located, to determine whether the establishment and maintenance thereof will promote the general good of the state. The commissioner shall thereupon appoint a time and place in such town for hearing the petition, and shall make an order for the publication of the substance of the petition and of the time and place of hearing three weeks successively in a newspaper published in the county wherein such town is situated, or, for want thereof, in an adjoining county, the last publication to be at least twelve days before the day appointed for the hearing." Sec. 8722, Ch. 381.

VIRGINIA

1 Code of Virginia, 1950

"*Participation by banks in school thrift or savings plans.*—A bank may contract with the principal of any elementary or secondary school, if authorized so to do by the school board in any county, city or town wherein such bank has a location, for the participation by the bank in any school thrift or savings plan, and it may accept deposits at such a school either by its own collector or by any representative of the school who becomes the agent of the bank for such purpose." Sec. 6-23.1 (1958 Supp.).

Limited Branch Banking—"No bank or trust company heretofore or hereafter incorporated under the law of this State shall be authorized to engage in business in more than one place, except that the State Corporation Commission, when satisfied that public convenience and necessity will thereby be served, may authorize banks having paid-up and unimpaired capital and surplus of fifty thousand dollars or over to establish branches within the limits of the city, town or county in which the parent bank is located. * * *" Sec. 6-26 (1958 Supp.).

WASHINGTON

Revised Code of Washington

Banks and Trust Companies: capital required.—"A bank or trust company having a paid-in capital of not less than

five hundred thousand dollars may, with the approval of the supervisor, establish and operate branches in any city or town within the state. A bank or trust company having a paid-in capital of not less than two hundred thousand dollars may, with the approval of the supervisor, establish and operate branches within the limits of the county in which its principal place of business is located.

"The aggregate paid-in capital stock of every bank or trust company operating branches shall at no time be less than the aggregate of the minimum capital required by law for the establishment of an equal number of banks or trust companies in the cities or towns wherein the principal office or place of business of such bank or trust company and its branches are located . . ." Sec. 30.40.020.

TERRITORY OF ALASKA

Session Laws of Alaska; 1951; Chapter 129

Limitation of branch banking.—"No bank heretofore or hereafter organized, shall open, commence or establish any branch bank, office or agency which is located more than one hundred (100) miles from its principal office." Sec. 3.212.

TERRITORY OF HAWAII

Revised Laws of Hawaii 1955; Ch. 178.

"No bank shall be permitted to open or maintain in the district of Honolulu, in addition to the main office of the bank, more than two branch banks (whether designated as branch banks or collection offices) within each of zones I and II, or more than one such branch bank within zone III, such zones being hereinafter described as follows:

"*Zone I:* extending from the western side of Nuuanu Avenue to the western limits of the district of Honolulu;

"*Zone II:* extending from the eastern limits of zone I to a line beginning at the sea and running along Kapahulu Avenue to the intersection of Kapahulu Avenue and Waialae Road, and thence following easterly on Waialae Road to St. Louis Drive, and thence along St. Louis Drive and Dole Street Extension to the boundary between Manoa Valley and Palolo Valley, and thence along said boundary to the Koolau range;

"*Zone III:* extending from the eastern limits of zone II to the eastern limits of the district of Honolulu." Sec. 178-39.

FILE COPY

No. 216

Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL BANK OF DETROIT, *Petitioner*,

v.

THE WAYNE OAKLAND BANK and RAY M. GIDNEY, Comptroller of the Currency, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF WAYNE OAKLAND BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF WAYNE OAKLAND BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner National Bank of Detroit filed its petition for certiorari on July 24, 1958. Respondent Wayne Oakland Bank obtained from the Court an extension to and including September 8, 1958, for filing this Brief in Opposition.

STATUTES AND REGULATIONS INVOLVED

The petition sets forth at pages 3-5 the relevant sections of the National Bank Act and the Michigan Financial Institutions Act involved in this proceeding.

In addition, certain regulations of the Comptroller of the Currency (12 CFR § 4.5) are pertinent to the issue, and these have been set forth in Appendix A, *infra*.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The National Bank Act (12 U.S.C. 36), *inter alia*, permits a national bank to establish and operate branches at any point within the state in which the national bank is situated if such establishment and operation are at the time authorized to state banks by the statute law of the state in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the state on state banks. Section 34 of the Michigan Financial Institutions Act, *inter alia*, permits a state bank to establish and operate a branch or branches within a village or city other than that in which it was originally chartered provided that no such branch shall be established in a city or village in which a state or national bank, or branch thereof, is then in operation. In view of such statutory provisions, can a national bank establish a branch in a city other than that in which its main office is located if there is then in operation in that city a branch of a state bank.

2. Where applicable law prohibits the establishment by a national bank of a branch in a city in which a branch of a state bank is then in operation, and the competition which will result from the establishment and operation of the branch of the national bank will cause irreparable injury to the state bank, may the state bank maintain this suit to enjoin the establishment and operation of the branch of the national bank and to enjoin the Comptroller from issuing his certificate under 12 CFR § 4.5(a)(3) with respect to such branch.

PRELIMINARY STATEMENT

Before discussing the particular points raised in the petition for writ of certiorari filed in this case, there are some preliminary matters which we believe should be brought to the Court's attention.

In several places the petition implies that the Comptroller's letter of March 19, 1956 was the statutory approval required by 12 U.S.C. 36(c).[1] This was a matter of considerable contention in the courts below. We should point out that one of the things which the Court of Appeals held in its opinion denying the motion for rehearing was that the statutory approval was not given until the certificate required by 12 CFR 4.5(a)(3) is issued. That certificate with respect to the proposed Troy branch of National Bank of Detroit had not been issued at the time this suit was started and its issuance was enjoined by both the District Court and the Court of Appeals (Petition for Certiorari pp. 12 and 13).

The statements on pages 5 and 7 of the petition for writ of certiorari would indicate that National Bank of Detroit had unconditionally determined on January 20, 1956 to establish a branch in Troy and that on March 19, 1956 the Comptroller had unconditionally approved its application for such a branch, and that as fast as possible thereafter National Bank of Detroit had proceeded to acquire a site, to erect a building and otherwise move as rapidly as possible to place the branch in operation and at the last moment was prevented from doing so by the temporary restraining order and subsequent injunction issued in this case. The facts, however, are otherwise.

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[1] Pet. p. 2, n. 2, p. 7 and p. 21, n. 20.

The controlling motive of National Bank of Detroit for the establishment of a branch in Troy was the possible merger of certain other banks into The Detroit Bank which was the largest competitor of National Bank of Detroit.[2] To insure protection of its competitive position with The Detroit Bank if the contemplated merger should take place and in order to avoid the effect of the second proviso of Section 34 of the Michigan Financial Institutions Act if Wayne Oakland Bank should commence operation of a branch in Troy, National Bank of Detroit on January 20, 1956 applied to the Comptroller for approval of its application to establish a branch in Troy (J.A. 42a-44a, 61a-62a). On February 23, 1956, National Bank of Detroit wrote the Comptroller a letter stating that in view of the Comptroller's indicated reluctance to approve the application because of the effect such branch might have on the Birmingham National Bank if the contemplated merger was not accomplished, National Bank of Detroit agreed that if would not open the Troy branch unless the merger was completed. (J.A. 84a-85a). The Comptroller on March 19, 1956 wrote National Bank of Detroit that "we have approved your application for permission to establish" the Troy branch but finishing with the statement that the branch should not open until the Comptroller's certificate has been issued (J.A. 92a).

[2] National Bank of Detroit then had total resources of nearly $2,000,000,000. After the merger The Detroit Bank and Trust Company had total resources of slightly over $1,000,000,000 and Wayne Oakland Bank had total resources of $84,028,096 (J.A. 49a). National Bank of Detroit had 55 branches, 22 of which were outside branches. All other Detroit banks had a total of 24 outside branches. Wayne Oakland Bank had 6 branches, 4 of which were outside branches (J.A. 40a, 49a).

Prior to April 2, 1956, the day on which Wayne Oakland Bank commenced operation of its Troy branch, National Bank of Detroit took no steps in connection with its proposed Troy branch except to obtain options on some vacant land which it purchased in April 1956 after authority therefor was given the officers by the bank's executive committee on April 12, 1956 (J.A. 45a, 95a). On April 11, 1956 and again in June of 1956 National Bank of Detroit informed Wayne Oakland Bank that the Troy branch of National Bank of Detroit would not open unless the merger was consummated (J.A. 47a 48a). While National Bank of Detroit, after April 2, 1956, took other steps to enable it to place the Troy branch in operation if the merger should be consummated, in so doing it was careful until the merger was a certainty that it not become too much involved in expenditures which would prove useless or which could not be recovered.

In June of 1956, the Boards of Directors of the banks involved in the proposed merger adopted the merger agreement and gave notice of stockholders' meetings to be held August 21, 1956 to ratify the merger (J.A. 47a). Prior to that time National Bank of Detroit had confined its activities to the acquiring of some vacant land, the grading of the site and the preparation of some plans for the building. On July 26, 1956, more than a month after the directors' meetings of the banks involved in the merger was held, National Bank of Detroit let a contract for the construction of the building (J.A. 45a), but the building was not actually commenced or a permit obtained therefor until August 24, 1956 (J.A. 46a), three days after the merger agreement had been approved by the stockholders of the constituent banks (J.A. 47a) and seven days after the filing of this suit (J.A. 1a). The

minutes of the meetings authorizing these expenditures show that the Executive Committee of National Bank of Detroit was careful to limit the authority of its officers in this matter so that the bank would not become involved in substantial expenditures which might prove useless or which could not be recovered if the bank did not proceed with the branch (J.A. 62a, 94a and 96a), and the construction contract was not authorized until July 26, 1956 (J.A. 96a-97a).

It was on these facts that both courts below held that Petitioner National Bank of Detroit had not established a branch in Troy prior to April 2, 1956, and that it could not do so after that date because the Troy branch of Wayne Oakland Bank was then in operation.

The petition for certiorari does not present as a reason for issuing the writ the question of whether National Bank of Detroit had established a branch prior to April 2, 1956, but contents itself with contending that the federal banking law does not incorporate the portion of the Michigan statute providing that no state bank may establish an outside branch[3] in a city in which there is then in operation another bank, state or national, or a branch thereof.

SUMMARY OF ARGUMENT

1. The applicability of the proviso of the Michigan Act to National banks.

(a) The question is not one of general importance calling for a decision of this Court. The decision is the first to involve 12 U.S.C. 36(c) on this point since

[3] The term "inside branch" as used in this brief refers to a branch of a bank, state or national, in the same city in which the main office of the bank is situated. The term "outside branch" refers to a branch located outside the city in which the main office of the bank is situated.

its enactment twenty-five years ago. Although Petitioner asserts it will create serious administrative difficulties for the Federal Government, the Comptroller, a defendant below, has not deemed it necessary to seek a review. A decision by this Court will not determine the effect of the branch banking statutes of 36 states and territories on branch banking by national banks, but can at most decide the effect of statutes of 8 states other than Michigan. The correctness of the decision below is demonstrated by the statements and actions of Petitioner and the Comptroller in this very matter.

(b) The decision is correct. Congress intended that a national bank should be permitted to establish a branch only at such points as it could if it were a state bank and to have no advantage in this respect over state banks. If the proviso is held inapplicable to national banks they would have a great advantage over state banks, destroying any equality of competitive opportunity, thus thwarting the purpose of Congress. The proviso is a "restriction as to location" to which Congress specifically subjected national banks. Neither the opinion of the Wisconsin Attorney General nor that of the Michigan Attorney General is authority to the contrary.

2. The right to sue. The decision in this case does not conflict with any decision of this Court or a Court of Appeals. Plaintiff had under the law an absolute right to be free from the competition of Petitioner's proposed Troy branch. Such right, coupled with irreparable injury, as here, entitled the holder of such right to enjoin the unlawful competition. Many decisions establish that right, including those cases with which Petitioner claims the decision in this case conflicts.

ARGUMENT

I

THE COURT BELOW DID NOT DECIDE ERRONEOUSLY AN IMPORTANT QUESTION WHICH SHOULD BE DECIDED BY THIS COURT

A. The Decision Below Does Not Involve "an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court"

Section 36(c) of the National Bank Act has been in force in substantially its present form since 1933. Yet, as petitioner states (p. 9), the decision below is the first decision by a Court of Appeals construing that section. Such lack of controversy over 25 years scarcely suggests a question of "utmost importance."

Although the judgment below enjoined both the Comptroller of the Currency and the National Bank of Detroit, the Comptroller, who is charged with the administration of this Act, has not petitioned for a writ of certiorari, and his counsel, the Solicitor General of the United States, has advised this Court that he does not desire to file any brief stating the Comptroller's views to this Court. Consequently, it has been left to the National Bank of Detroit to maintain here that an important question has been raised. In so doing, it has urged that the decision below will create administrative difficulties, real or fancied, in the Comptroller's administration of the Act which, if valid, would be of much more concern to the Comptroller than to the National Bank of Detroit.

Petitioner claims that the issue is important because thirty-six states and territories permit branch banking (Petition, pp. 13-14, Appendix C). The decision in this case can, at most, determine the effect of statutes in only eight other states[4] having statutes similar to

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[4] Idaho, Indiana, Iowa, Kentucky, Massachusetts, New Mexico, New York, South Dakota.

the Michigan Act which contains an absolute prohibition against the establishment of an outside branch in any city in which there is a bank or a branch. The decision will not determine the effect of statutes in the states in which the alleged difficulties will arise. The statutes of those states, such as Wisconsin (discussed *infra*, page 23) provide that the point at which a branch may be established is to be designated by a state official based on his determination of need. Such statutes present an entirely different question to which the decision in this case will provide no answer.

Both Petitioner and the Comptroller contended in the Court of Appeals, as Petitioner is contending here, that the second proviso to the Michigan Act is not applicable to national banks. That proviso is as follows:

> "Provided further, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation:" (C.L. 1948, § 487.34)

This contention is directly contrary to the prior statements and actions of both of them in connection with this very matter.

The applicability of this proviso as a bar to the establishment by Petitioner of a branch in Troy after the commencement of operations of the Troy branch of Wayne Oakland Bank, was not only asserted by both Petitioner and the Comptroller many times but was the reason given by both of them for "expediting" the investigation of the application of Petitioner for permission to establish a branch in Troy, and was used by both of them as an excuse for omitting two important steps customarily taken in the investigation of

such applications—the notification of the Michigan Commissioner of the filing of the application, and the communication with potentially competing banks to ascertain what effect the establishment of such a branch would have on them.

Typical of their statements and actions are the following statements in a memorandum, produced from the files of the Comptroller, recording a conference between the Comptroller and certain of his subordinates and officers of Petitioner on February 3, 1956, with reference to the application of Petitioner to establish a branch in Troy:

> "Due to the provisions of the Michigan statute limiting the establishment of branches, once a branch operation is commenced in Troy, no other outside bank could establish a branch there. Bank's counsel advises that prior to that time, however, there is no legal obstacle to the granting of permission to establish a branch." (J.A. 105a)
>
> * * *
>
> "The visiting gentlemen presented formal application for the * * * branches, and requested that, regarding the one in Troy, that it be kept on a confidential basis and that we do not notify Commissioner Eveland, or contact any of the competing banks. The reason for the request was that the visitors were fearful of a leak through the State Commissioner's office that this bank was after a branch, which would cause the Wayne-Oakland Bank to hasten to open in temporary quarters in an attempt to legally block this application.
>
> "The visitors were informed that not to notify Commissioner Eveland of this application would be a deviation of our present working arrangement with his office. Mr. Gidney said that we would have an Examiner make this investigation to determine the need for a branch, and would instruct

him to keep the investigation on a confidential basis, not contacting any competing or neighboring banks. It was understood that we would not contact Commissioner Eveland's office at this time" (J.A. 106a)

To the same effect are certain letters, minutes and other matter, excerpts from which are set forth in Appendix B, *infra*.

The Comptroller testified on deposition that contrary to the usual practice of his office, the investigation of the application of Petitioner with respect to the Troy branch was conducted in a confidential manner for fear that some state bank might get into operation in Troy first (J.A. 131a-132a).

On October 18, 1956, at the hearing in the District Court for the District of Columbia on the Motion for Preliminary Injunction in this case, the attorney for the Comptroller informed the Court that the second proviso of Section 34 of the Michigan Act was "the crux of this case" and said that Plaintiff's statement that the law does not authorize the establishment of a branch of a national bank if a branch of a state bank is already in operation was "entirely correct." He said his disagreement with Plaintiff's counsel was over the meaning of the word "established." The proceedings of October 18, 1956 have not been printed in full in the Joint Appendix. An excerpt from them is set forth in Appendix II, pp. 4b to 5b of Brief for Plaintiff and Appellee filed in the Court of Appeals (R. 226a-227a).

We do not, of course, claim that Petitioner is legally barred from changing its position on the effect of this proviso. However, such a complete about-face on this point in connection with this very matter makes

much less impressive than they would otherwise be. Petitioner's present arguments that the decisions of the Courts below were erroneous and that the error calls for correction by this Court.

B. The Decision of the Court Below Is Correct

Petitioner contends that the second proviso of Section 34 of the Michigan Financial Institutions Act (M.S.A. 23.762), which provides that an outside branch of a state bank shall not be established in a city in which a state or national bank or branch thereof is then in operation, does not apply to the establishment of an outside branch by a national bank. Wayne Oakland Bank contends that the proviso plainly applies to national banks because of 12 U.S.C. 36 which provides that a national banking association may establish and operate outside branches:

> "at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

In upholding Wayne Oakland Bank's contention that the Michigan proviso was applicable to national banks, the Court of Appeals in its opinion denying a rehearing said (R. 285a-286a):

> "The history of federal legislation regarding branch banking and the statutes applying thereto leaves a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a

national bank was to be permitted to establish and operate a branch in a state only at such a point as it could, by express provisions of a state statute, establish and operate a branch if it were then a state bank."

Wayne Oakland Bank asserts that this is a correct statement.

History of Branch Banking

The history of the Federal legislation dealing with branches of national banks shows several things. It shows that Congress intended its grants of power to be strictly construed and not extended by forced construction or implication; it shows that Congress intended that national banks were not to have power to establish and operate branches that was not clearly expressed in the legislation; and it shows most clearly that Congress intended that national banks should never have any advantage in this respect over state banks.

An important part of this history consists of the annual reports of the Comptroller of the Currency to Congress during the ten years preceding 1932. In these reports the Comptroller took the position that branches for national banks were not merely desirable but were essential if the country was to have adequate banking facilities and if the national banking system was to survive.[5] He even expressed fears for the continuance of the Federal Reserve System if this disadvantage on national banks was not removed. Commencing with 1929 he urged that such branches be permitted anywhere in the trade area of the bank regardless of state lines. He supported his arguments

[5] An analysis of these reports is contained in Appendix C, *infra*.

with impressive arrays of facts. However, during all of this period Congress stood fast against what it considered to be an invasion of the rights of banks in the smaller communities and the only fruit born by these efforts of the Comptroller during this period was the passage by Congress in 1927 of an act permitting inside branches subject to certain limitations.

In 1932, Senate Bill 4412 embodying these recommendations of the Comptroller was introduced by Senator Glass.

Present subdivision (*c*) of 12 U.S.C. 36 treats inside branches and outside branches separately. Senate Bill 4412, as originally introduced and as recommended by a majority of the Senate Committee, did not do so. It provided for an amendment of this subsection so as to permit a national bank to establish and operate new branches

> "within the limits of the city, town, or village, or *at any point within the State* in which said association is situated: *Provided,* That, if by reason of the proximity of such an association to a State boundary line, the ordinary and usual business of such association is found to extend into an adjacent State, the Federal Reserve Board may permit the establishment of a branch or branches by such association *in an adjacent State* but not beyond a distance of fifty miles from the place where the parent bank is located." (Emphasis supplied)

Senator Bratton offered an amendment to limit branches to points within the state, and then only "if such establishment and operation are at the time permitted to state banks by the law of the state in question." The effect of Senator Bratton's amendment would merely have been to make applicable to outside

branches the provisions of the 1927 Act with respect to inside branches. Senator Wheeler objected to the use of the word "permitted," pointing out that if the law of a state was silent on the subject, national banks might be permitted to have branches in that state and that he wanted a provision that "branch banks shall not be permitted in a state unless the Legislature or the people themselves, through an initiative, actually by law say that they shall be permitted there." (Cong. Rec. V. 76, p. 1997) Senator Bratton's proposed amendment was then changed so that such establishment would be permitted "if such establishment and operation are at the time expressly authorized to State banks by the law of the state in question and subject to the restrictions as to location imposed by the law of the State on State banks." This applied to both inside and outside branches. The amendment to the bill was adopted and the bill in that form passed the Senate, but was not acted on by the House. (Cong. Rec. V. 76, pp. 2205, 2208, 2517)

The 1933 legislation originated in the House of Representatives in the form of House Bill 5661. That bill proposed no change in the then existing law (which permitted only inside branches). When that bill reached the Senate, Senate Bill 1631 was substituted for House Bill 5661. Senate Bill 1631 contained the same provision with respect to branches that had been adopted by the Senate in 1932 by Senate Bill 4412 as amended at the insistence of Senators Bratton and Wheeler. Section 22 of Senate Bill 1631 read in part as follows:

> "Sec. 22. Paragraph (e) of Section 5155 of the Revised Statutes, as amended, is amended to read as follows:

> "'(c) A national banking association may with the approval of the Comptroller of the Currency establish and operate new branches within the limits of the city, town or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. * * * '"

After passage by the Senate of Senate Bill 1631 in that form the bill went to Conference Committee and the Committee rewrote this subsection. In doing so the Committee separated the provision governing inside branches from that governing outside branches. No material change was made in this subsection with respect to inside branches as it had been enacted in 1927 except to change the word "permitted" to "expressly authorized." As to outside branches, however, the bill as changed by the Committee provided that outside branches were to be permitted,

> "if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

In that form the bill passed both Houses and this language has not been changed since.

The difficulty experienced in getting Congress, first to permit any branches, and later to permit outside branches, and the language used by Congress and the extreme care taken in the adoption of that language, evidence clearly an intention of Congress to permit

branches, and particularly outside branches, only to a very limited extent—only to the same extent that such branches are permitted by state statute to state banks; and to make doubly certain that national banks should have no advantage over state banks in this respect it made national banks "subject to the restrictions as to location imposed by the law of the State on State banks."

Equality of Competition

Petitioner's argument is based in a large part on its statement that the "acknowledged legislative purpose" of the National Bank Act was "to place national and State banks on a competitive equality" (p. 17, Petition for Certiorari). As a general statement this is true, but like all generalizations it must be applied with care and discrimination.

Petitioner's contention would not provide the competitive equality which it asserts Congress intended to establish. It would do exactly the opposite. If the second proviso of the Michigan Act is not applicable to national banks, national banks will enjoy a tremendous competitive advantage in the right to establish branches, because it is not contended and cannot be contended that that proviso is not applicable to state banks.

There are more than twenty cities in Wayne, Oakland and Macomb counties, most of them within twenty-five miles of downtown Detroit, where the main office of National Bank of Detroit is located. If the proviso to the Michigan Act is not applicable to national banks any national bank in this area may establish either an inside branch or an outside branch in any one of these cities regardless of the presence there of the main office

or a branch of either a state or a national bank. But no state bank may establish an outside branch in any one of these cities in which there is either the main office or a branch of either a national bank or another state bank.

Petitioner asserts the right to establish a branch in the City of Troy regardless of the presence there of a branch of Wayne Oakland Bank, but it cannot dispute the fact that because of this very proviso Wayne Oakland Bank cannot establish a branch in any of the cities in the area in which Petitioner has a branch. To carry the matter one step further, if the proviso is not applicable to national banks, Petitioner (and any other national bank in the area) can establish a branch in the relatively small suburban city of Royal Oak where the main office of Wayne Oakland Bank is located, but, clearly, Wayne Oakland Bank cannot establish a branch in Detroit with its two million population even though the Detroit city limits are less than three miles from the main office of Wayne Oakland Bank. This demonstrates quite clearly that the legislative purpose of Congress to place national and state banks on a competitive equality will be completely destroyed if the second proviso of the Michigan Act is held inapplicable to national banks.

It is true that the proviso creates a monopoly, albeit a very limited one. Any statutory designation of the points at which banks may establish branches and any restrictions as to the location of such branches tend to restrain competition and create some monopoly. This is merely a monopoly of the right to establish outside branches in a city. It is not a monopoly of the banking business of the community. The prior establishment of an outside branch in a city does not prevent

the establishment of a main office of a bank in that city. Moreover, the customers of a bank need not and do not respect municipal boundaries in selecting their banks.

The monopoly created by this law serves a real purpose. As the reports of the Comptroller show, many outlying communities cannot support a bank. Nevertheless adequate and safe banking facilities are necessary for the development of these communities. Often the only way in which such communities can have these banking facilities is by the establishment of a branch of a bank from some other community. Such branches frequently operate at a loss for a considerable period of time (J.A. 187a). To induce banks to establish branches in such communities and suffer such loss the Legislature has assured any bank doing so that after it has assisted in developing the community to a point where the banking business is profitable, some other bank will not be permitted to come in and, by the establishment of an outside branch, participate in the cream that has resulted from the husbandry of the original bank during the unprofitable period. This is not done just for the benefit of the bank but also as a means of obtaining banking facilities which might otherwise be unobtainable. It is precisely for this reason that public utilities are frequently given monopolies and banks are of somewhat the same character. See *Little* v. *American State Bank*, 263 Mich. 645, 648.

Restrictions as to Location

Petitioner urges that the second proviso of Section 34 of the Michigan Act is not applicable to national banks because it does not create a "restriction as to

location." Petitioner states (p. 10) that Congress has specified only two respects in which the establishment and operation of a branch by a national bank is to be *limited* by state law. From this it argues that Wayne Oakland Bank must stand or fall on the phrase "restrictions as to location" in 12 U.S.C. 36(c). We think this overlooks the meaning and effect of this entire section.

A national bank has no inherent right to establish a branch.[6] Its right to do so must be found in some Act of Congress. That right is contained in 12 U.S.C. 36(c). But in determining the extent of that right consideration must be given both to the positive and the negative expressions—to the language of the grant as well as to specifically expressed limitations. Stripped of language not important to this part of the present controversy, the right of a national bank to establish an outside branch is contained in the following language of 12 U.S.C. 36(c):

> "(c) A national banking association may * * * establish and operate new branches: * * * (2) at any point within the State * * *, if *such* establishment and operation are at the time authorized to State Banks by the Statute law of the State * * *." (Emphasis supplied.)

Read literally this language grants the right to a national bank to establish an outside branch only in a state in which state statute authorizes state banks to establish branches *at any point within the state*.[7] Read

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[6] *St. Louis First National Bank* v. *Missouri*, 263 U.S. 640.

[7] The statement in the petition (pp. 12-13, n. 9) that the authorization clause permits the establishment of a branch of a national bank at any point within the state if the "establishment of branches" is at the time authorized to state banks, is obviously

literally this language would not permit Petitioner to establish *any* outside branch because Michigan statute law does not permit state banks to establish branches *at any point within the state*. We do not contend that the language should be so narrowly construed. We believe that what Congress meant by this language was that a national bank may establish and operate an outside branch at any point within the state at which such establishment and operation would then be authorized by state statute to a state bank. Petitioner contends (p. 12) that such a construction makes the "restrictions as to location" clause surplusage. Perhaps so, but this would not be the first instance in which Congress has used what might be unnecessary language to make certain that its intention would not be thwarted. But surplusage or not, and without, but certainly with, the "restrictions as to location" clause,

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incorrect. Similar expressions appear elsewhere in the petition. These apparently are based on a contention that the words "such establishment and operation" relate to "new branches" rather than to "at any point within the State." Such a contention is shown to be unsound by an examination of the provision with respect to inside branches where the same words ("such establishment and operation") are used. That provision reads as follows:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;"

Obviously the words "such establishment and operation" in the provision with respect to inside branches relates to the right to establish branches "within the limits of the city, town or village in which such association is situated." Equally obviously the words "such establishment and operation" in subdivision (2) dealing with outside branches refers to the language "at any point within the state."

we believe the construction we have given expresses precisely what Congress meant.

The history of this legislation shows clearly that in this matter Congress did not intend national banks to have *any* advantage over state banks. To make certain of this Congress used both affirmative and negative language. It thus insured what Petitioner calls "competitive equality." But only by the construction of this entire language as we have contended can this "competitive equality" be accomplished.

We take up, however, Petitioner's argument that the second proviso to Section 34 of the Michigan Act is not a "restriction as to location."

Petitioner's argument is that the proviso does not create a restriction on location but is merely a limitation on the number of banks which may establish branches in a particular community.

If the proviso had read:

> "Provided further, That no such branch shall be established within a distance of two miles of a state or national bank or branch thereof"

we do not believe it could be successfully asserted that this was not a restriction as to location imposed by law on state banks. There would seem to be no reason why the Legislature could not use municipal boundaries instead of miles or any other determinant in establishing a permitted or proscribed area for outside branches. In defining the "point" within the state at which a state bank may establish an outside branch the Legislature has said that it must be within a city or village in which there is no other bank, state or national, or branch thereof. It has prohibited the establishment

of an outside branch of a state bank in any city or village in which a state or national bank or branch thereof, is then in operation. Clearly, this falls within both the permissive and restrictive clauses of 12 U.S.C. 36(c).

Petitoner relies on an opinion of the Wisconsin Attorney General dated March 19, 1947. (For entire opinion see R. pp. 210a-222a). The question involved in the Wisconsin Attorney General's opinion was not whether a state bank could have established a paying and receiving station at that particular point but whether a requirement that the need for banking facilities at that point be determined by the State Commission was a "restriction as to location." This is clearly shown by the last portion of the opinion where he pointed out that the national bank was complying with all other requirements of Wisconsin law and the regulations of the State Banking Commission, including the requirement that the paying and receiving station be not closer than three miles to an existing bank.' (R. 221a)

Obviously the requirement that a state bank not establish a paying and receiving station except at a point which the State Commission determines not to be adequately served with banking facilities, is not a restriction as to location "imposed by the *law* of the

'While the Wisconsin Attorney General used language which standing alone might support the contention that if the state law permits the establishment of "branches" a national bank may establish a branch at any point within the state, this was not the controlling thought behind the Wisconsin Attorney General's opinion. It is obvious that if the national bank there involved had been a state bank it could have established a paying and receiving station at this point if it had received the approval of the Wisconsin State Banking Commission.

State." The restriction comes about as a result of the discretionary action of the Wisconsin Commission. That is not the type of restriction which Congress meant.[2]

The Wisconsin Attorney General relied heavily on *Rushton* v. *Michigan National Bank*, 298 Mich. 417. In that case the Michigan Court was dealing with precisely the same type of situation. In the *Rushton* case the Attorney General of the State of Michigan filed suit to determine under what authority the Michigan National Bank operated branches in various cities and acted in fiduciary capacities in those cities. The Comptroller of the Currency had authorized the bank to establish and operate the branches in question. The Michigan Attorney General claimed that for a national bank to establish an outside branch in the state it must appear that state law gave an unqualified or unconditional right to state banks to do so, and that since Section 34 of the Michigan Act only permitted a state bank to do so "upon obtaining permission in writing from the Commission" a national bank might not operate a branch without complying with this provision of the Michigan statute.

The Michigan Supreme Court, after quoting at length from many decisions to show that national banks are not subject to the provisions of state law which

[2] As pointed out in the Petition for Certiorari (p. 13) the only "restriction as to location" contained in the statutes of many states is one based solely on the discretion of a state official. Since the second proviso of Section 34 of the Michigan Act is not of this character the holding of the court below is not to "sweep within the federal 'restrictions as to location' clause a myriad of state law conditions having no relation to 'location.'" (Pet. p. 14.)

give state banking commissions administrative control over state banks, said (p. 437):

> "The conclusion reached after examining the foregoing authorities is that the approval of the comptroller of the currency alone is required for the establishment and operation of branch banks of a national banking institution within the State of Michigan and that such branch banks may be established and operated to the same extent and subject to the same limitations as are State banks."

Wayne Oakland Bank is not relying in this case on any provision of the Michigan Act which vests discretionary power in the hands of the Michigan Commission. Nor is it relying on any restriction as to location which the Michigan law places within the administrative discretion of the Michigan Commission. While Section 34 of the Michigan Act permits a state bank to establish an outside branch only with the permission of the Commission, Wayne Oakland Bank does not contend that such permission is necessary for a national bank. What it does contend is that Section 34 of the Michigan Act does not permit a state bank to establish an outside branch in a city in which a bank or branch thereof is in operation even if the Michigan Commission determines that there is a need for such facilities at that point, and that therefore a national bank may not establish an outside branch in such a city even though the permission of the Michigan Commission is not required of a national bank in any case.

One further point as to the Petitioner's contention that the second proviso of Section 34 of the Michigan Act (by the use of municipal boundaries as location points) is not a "restriction as to location." Congress

has done exactly the same thing in 12 U.S.C. 36(c)—once in subdivision (1) permitting the establishment of inside branches and again in subdivision (2) by permitting the establishment of "seasonal agencies" "if no bank is located and doing business in the place where the proposed agency is to be located." We doubt very much that the Petitioner or anyone else would dispute that the language quoted is a "restriction as to location," yet the substance of that language is identical with the substance of the second proviso of Section 34 of the Michigan Act, which was adopted in its present form ten years after Congress added the "seasonal agency" amendment in 1935.

Opinion 1370 of Michigan Attorney General

The implication in footnote 20 on page 21 of the Petition that the Michigan Attorney General, in Opinion 1370 (J.A. 69a), held that the proviso to the Michigan Act is not applicable to national banks is entirely incorrect. The opinion of the Attorney General was intended to be an opinion on the question of when a branch, state or national, was deemed to be "established" within the meaning of that proviso, as is clearly shown by the following language of the opinion:

> "The establishment of the proposed national branch bank is permissible under this act, there being no branch bank 'in operation' at this time in the locality in question." (J.A. 72a)

It is also clearly shown by the request for the opinion (J.A. 197a-198a) and by the Opinion of the Attorney General of February 24, 1953 (J.A. 200a-203a). Both of these opinions were relied on by Petitioner and the Comptroller in the courts below to support their contention that Petitioner had "established" a branch

in Troy prior to the time Wayne Oakland Bank commenced operation of its Troy branch (a contention with which both courts below disagreed). But no claim has ever been advanced that the Attorney General in Opinion 1370 held that the proviso was not applicable to national banks.

It is respectfully submitted that the second proviso of Section 34 of the Michigan Act is applicable to national banks, and that under it and 12 U.S.C. 36 a national bank is prohibited from establishing an outside branch in Michigan in any city in which a state or national bank then has its main office or has an outside branch in operation.

II

THE HOLDING OF THE COURTS BELOW THAT RESPONDENT STATE BANK HAD STANDING TO MAINTAIN THIS ACTION DOES NOT CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT AND THE RULING OF ANOTHER COURT OF APPEALS

In determining whether or not Wayne Oakland Bank had the right to bring this suit it must be borne in mind that this case is not (as so many of the cases before this court have been) a suit in which the right is sought to enjoin claimed illegal action of a Government official on the ground that such action will result in injurious but *lawful* competition. The essence of the complaint in this case is that the establishment by National Bank of Detroit of a branch in Troy after April 2, 1956, the date on which Wayne Oakland Bank commenced operation of its Troy branch, would in and of itself be illegal and would be in violation of Wayne Oakland Bank's "exclusive right to operate a branch bank in the City of Troy" (J.A. 13a).

Since both of the lower courts held that the competition itself would be unlawful and that such competition would result in irreparable injury to Plaintiff both courts enjoined the competition. Both courts likewise enjoined the Comptroller from issuing his certificate by which he would place the stamp of his approval on the illegal competition that would result.

There are two distinct lines of cases with respect to the standing of a litigant to maintain suit to enjoin competition. Petitioner here has confused these two lines of decisions, and has attempted to rely on that line which is inapplicable to the facts.

One line of decisions stands for the proposition that where the litigant possesses a legal right conferred by statute to be free from competition, it has standing to sue where that right is threatened with invasion. Typical of this line of cases are the decisions of this Court in *Walla Walla City* v. *Walla Walla Water Company*, 172 U.S. 1; *Frost* v. *Corporation Commission*, 278 U.S. 515; *Chicago* v. *A. T. & S. F. Railway Company*, 357 U.S. 77, decided June 16, 1958. See also *New State Ice Co.* v. *Liebmann*, 285 U.S. 262. Compare *Columbia Broadcasting System* v. *United States*, 316 U.S. 407; *Stark* v. *Wickard*, 321 U.S. 288.

The second line of decisions stands for the proposition that a litigant who does not possess a present exclusive right to be free from competition has no standing to sue to restrain either private or public competition on the ground that such competition is either an *ultra vires* act (in the case of a private corporation), or an invalid act beyond the legal powers of the governmental instrumentality. Representative of this line

are the following decisions: *Alabama Power Company* v. *Ickes*, 302 U.S. 464; *Duke Power Company* v. *Greenwood County*, 91 F. 2d 665 (CCA 4), affirmed, 302 U.S. 485; *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U.S. 118; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (D.C. Cir. 1955), *cert. den.* 350 U.S. 884.

Both of these lines of cases adopt exactly the same principle of law. In the first line of cases plaintiffs were held entitled to sue because the challenged *competition* was *unlawful*. In the second line of cases plaintiffs were held not entitled to sue because the challenged *competition* was *lawful*. The two lines result from the application of the same principle of law to different factual situations.

The right of one who will be injured by *unlawful* competition to enjoin that competition is clear.

Frost v. *Corporation Commission*, 278 U.S. 515, involved a statute of Oklahoma which declared the business of operating a cotton gin to be a public utility, and which prohibited such operation without a license from the Corporation Commission. The statute, as originally enacted, required a showing of public convenience and necessity as a condition for the granting of a license. Plaintiff after making such a showing obtained a license to operate a gin. Thereafter, by amendment to the statute, it was provided that certain cooperatives could obtain licenses without a showing of public convenience and necessity. Such a cooperative applied to the Corporation Commission for a license to operate a gin. It did not make any showing of public convenience and necessity. Plaintiff protested to the Commission the granting of the license without

such a showing, but the Commission held that the amendment to the statute made it mandatory to grant the license without regard to necessity. Plaintiff filed suit to enjoin the Commission from issuing the license and to enjoin the cooperative from the establishment of the gin on the ground that the amendment to the statute was invalid as contravening the due process and equal protection clauses of the Fourteenth Amendment. In holding that plaintiff was entitled to an injunction as prayed, this Court said (p. 521):

> "Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. 6 *Pom. Eq. Jur.*, 3d ed. (2 Eq. Rem.) §§ 583, 584; *People's Transit Co.* v. *Henshaw* (C.C.A. 8th), 20 F. (2d) 87, 90; *Bartlesville Electric Light & P. Co.* v. *Bartlesville Interurban R. Co.*, 26 Okla. 453, 29 L.R.A. (N.S.) 77, 109 Pac. 228; *Patterson* v. *Wollman*, 5 N.D. 608, 611, 35 L.R.A. 536, 67 N.W. 1040; *Millville Gaslight Co.* v. *Vineland Light & P. Co.*, 72 N.J. Eq. 305, 307, 65 Atl. 504. The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law."

New State Ice Co. v. *Liebmann*, 285 U.S. 262, involved a statute that prohibited carrying on the ice

business without first securing a license to be issued only on a showing of public convenience and necessity. Plaintiff had obtained such a license. Defendant was carrying on such business without a license. In passing on Plaintiff's right to an injunction, this Court said (p. 273):

> "* * * but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated. If this legislative restriction be within the constitutional power of the state legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so. *Frost v. Corporation Commission,* 278 U.S. 515, 519-521."

In *Alabama Power Company* v. *Ickes*, 302 U.S. 464, plaintiffs, various power companies operating electricity distribution systems, sought to enjoin the Federal Emergency Administrator of Public Works from giving financial assistance to various municipalities in the construction of electric plants which the municipalities would then operate in competition with plaintiffs. Plaintiffs claimed that the act authorizing such assistance was unconstitutional and that the Administrator was exceeding the authority granted him by the act. One of the grounds on which plaintiffs in that case claimed standing to sue was the injury, perhaps the destruction, of their business that would result from the competition of the municipalities. In that case the Court held that plaintiffs did not have standing to maintain the suit, but it is clear from a reading of the opinion that the reason the Court reached that conclusion was because of a finding by the Court that

the competition from the municipalities would be entirely lawful. The Court's opinion on this point is well summarized in one sentence on page 478, as follows:

> "In short, the case for petitioner comes down to the contention that consummation of the loan-and-grant agreements should be enjoined on the sole and detached ground that the administrator lacks constitutional and statutory authority to make them, and that the resulting moneys, which the municipalities have clear authority to take, will be used by the municipalities in *lawful*, albeit destructive, competition with petitioner." (Emphasis supplied.)

That the Court in the *Alabama Power* case recognized that that rule would not be applicable to a case where the competition itself would be unlawful, is clearly shown by the paragraph of the Court's opinion in which the Court distinguished the *Alabama Power* case from *Frost* v. *Corporation Commission*, *supra*, on the ground that in the *Frost* case the threatened competition was unlawful, saying (pp. 484 and 485):

> "*Frost* v. *Corporation Commission*, 278 U.S. 515, 73 L. ed. 483, 49 S. Ct. 235, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of Durant, Oklahoma, for the operation of which he had a license from the corporation commission. The law of Oklahoma provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar valid grants to others, it was exclusive against an attempt to operate a competing

gin without a permit or under a void permit. The Durant Co-operative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete, and sustained Frost's right to an injunction *against the commission and the Durant company.* See *Corporation Commission* v. *Lowe*, 281 U.S. 431, 435, 74 L. ed. 945, 948, 50 S. Ct. 397. The difference between the *Frost* case and this is fundamental; for the competition contemplated there was *unlawful* while that of the municipalities contemplated here is entirely *lawful.*" (Emphasis supplied.)

See also *Greenwood County* v. *Duke Power Company* (CCA 4), 81 F. 2d 986, and *Duke Power Company* v. *Greenwood County* (CCA 4), 91 F. 2d 665, affirmed in 302 U.S. 485.

These cases and the principles followed in them have been completely ignored by Petitioner. Instead, Petitioner asserts that the holding of the lower courts that Plaintiff may maintain this action conflicts with the decision of this Court in *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U.S. 118. In so contending Petitioner has seized on the following language in the majority opinion:

> "Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy. That policy is subject to authorization at the will of the legislature. The declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business or thereafter embarking on it." 306 U.S. 141.

Petitioner attempts to read into the quoted language a holding that one who will be injured by competition,

the existence of which is prohibited by statute, may not sue to enjoin that competition if the statute can be changed. To put it in other words, they contend that one who has a monopoly created by an applicable statute may not sue to protect that monopoly even while the statute is in force if the legislative body which enacted the statute can, by amendment or repeal of the statute, modify or eliminate the monopoly which it has thus conferred. We do not think that the language of the *Tennessee Power* case should be so construed for the following reasons:

1. While the cases cited by this Court in support of the language quoted from the *Tennessee Power* decision support the statement made in that case, they do not support Petitioner's contention as to the meaning of that statement. These cases are *Wheeling & B. Bridge Co.* v. *Wheeling Bridge Co.*, 138 U.S. 287, and *Williams* v. *Wingo*, 177 U.S. 601. In both of these cases the Court held that in the absence of a provision in a statute binding it not to do so, a state could repeal or amend a statute creating a limited monopoly without violation of the contract clause of the Federal Constitution and that *after it had done so* the holder of such a limited monopoly could not challenge the right of the holder of another license granted by the state to infringe what had formerly been the limited monopoly.

2. Petitioner's contention advanced here was not argued or suggested in the briefs filed in this Court in the *Tennessee Power* case. The *Frost* case was distinguished on the ground that the injurious competition in the *Tennessee Power* case was lawful (citing *Alabama Power Company* v. *Ickes*, *supra*); and on the ground that the statute in the *Frost* case conferred a quasi-monopoly whereas the power com-

panies had no statutory monopoly, their "franchises" consisting merely of power to act as public utilities, which conferred no exclusive right, and their rights to use public streets which were not being violated. It was not claimed that the holder of a monopoly granted by a statute which is subject to change may not sue to protect that monopoly while the statute remains in effect.

3. If this Court in the *Tennessee Power* case meant what is contended by Petitioner, then the *Tennessee Power* case overruled *Frost* v. *Corporation Commission, supra, New State Ice Company* v. *Liebmann, supra*, and the basis for the decision of this Court (though not the result) in *Alabama Power Company* v. *Ickes*, 302 U.S. 464, which was decided by this Court only one year before the Court decided the *Tennessee Power* case. The Court in the *Tennessee Power* case specifically adopted the principles announced in the *Frost, Liebmann* and *Ickes* cases in the following language:

> "The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." 306 U.S. 137.

Not only is there nothing in the opinion of the *Tennessee Power* case which indicates that this Court in that case was overruling any of its prior decisions, the Court affirmatively stated that its decision was

based on prior decisions. Thus we find the statement that

> "The contention (that Tennessee Electric Power Company had the right to sue) is foreclosed *by prior decisions* that the damage consequent on competition, *otherwise lawful,* is in such circumstances damnum absque injuria, and will not support a cause of action or a right to sue." (Emphasis supplied) 306 U.S. 140,

citing in support of this statement, among others, *Alabama Electric Power Company* v. *Ickes, supra,* and *Greenwood County* v. *Duke Power Company,* 81 F. 2d 986, 997, and *Duke Power Company* v. *Greenwood County,* 91 F. 2d 665, 676. The Court was careful to distinguish the *Tennessee Power* case from the *Frost* case on another ground (306 U.S. 143) which shows quite clearly that the *Frost* case was not overlooked by this Court in handing down an opinion which it is claimed overruled the *Frost* case without saying so.

4. The language quoted from the *Tennessee Power* case was merely the introduction to the next paragraph of its opinion in which the Court pointed out that every state in which the Tennessee Valley Authority was then functioning had amended its statutes to exempt the Authority from the requirement of obtaining a certificate of convenience and necessity, thereby making the challenged competition entirely lawful. This is clearly shown by the following language earlier in the opinion:

> "The franchise to exist as a corporation, and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition, and affords the corporation no legal cause of complaint by reason of the state's *subsequently* authorizing another to enter and operate in the same field." (Emphasis supplied) 306 U.S. 139.

5. As Petitioner has pointed out, this Court has recently considered substantially this same question in *Chicago v. A. T. & S. F. Railway Company*, 357 U.S. 77, decided June 16, 1958, in which this Court overruled the contention that Parmelee had no standing to review an adverse ruling of the lower court. Parmelee had been licensed to operate under a Chicago ordinance which, if valid, prohibited Transfer from operating in competition with Parmelee unless Transfer obtained a license. Certainly the ordinance could have been amended or repealed. Parmelee relied on *Frost v. Corporation Commission*. In disposing of this question this Court said:

> "Second. Parmelee has standing to secure review of the judgment below by appeal. It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition. Transfer, on the other hand, suggests that Parmelee has no standing because the city ordinance is invalid and Transfer's operation is lawful. It argues that a party has no right to complain about lawful competition, citing *Alabama Power Co. v. Ickes*, 302 U.S. 464, and *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118. We do not regard either of these cases as controlling here." (357 U.S. at 83.)

The decision of the District of Columbia Circuit in *Kansas City Power & Light Co. v. McKay*, *supra*, is a mere exemplification of this Court's decision in the *Tennessee* case, *supra*. The complainant had no present right conferred by statute to be free from competition, and therefore no standing to sue. In citing and

relying on the *Tennessee* case, the District of Columbia Circuit clearly stated (225 F. 2d 929):

> "It [this Court in the TVA case] rejected the contention that the competition which the Authority's program would provide was illegal, pointing out that the charters and franchises awarded to the public utility companies did not 'involve the grant of a monopoly or render competition illegal' ".

In the case at bar, however, Wayne Oakland Bank has a monopoly which protects it from competition by a national bank. That monopoly was created as against state banks by the second proviso of Section 31 of the Michigan Financial Institutions Act and was made applicable against national banks by 12 U.S.C. 36 (c). While these acts are in effect Wayne Oakland Bank is entitled to be free of the competition that would result from the establishment and operation in Troy of an outside branch of either a state or a national bank. In this respect Wayne Oakland Bank's position is even stronger than was the position of the Plaintiff in *Frost* v. *Corporation Commission* because the monopoly provided by these statutes is exclusive whereas the monopoly provided by the Oklahoma statute involved in the *Frost* case was exclusive only to a limited extent.

The statement on page 26 of the petition that "the essence of the complaint (in this case) is that the plaintiff will suffer competition from the action of administrative officials taken pursuant to statute" is not correct. The essence of Plaintiff's complaint in this case is that the establishment and operation by National Bank of Detroit of a branch in Troy will in and of itself be a direct violation of the exclusive monopoly to operate such a branch granted Wayne Oakland

Bank by the Federal law. This is precisely the type of complaint that was involved in the *Frost* case and in the Parmelee case, and in holding that Plaintiff was entitled to relief this Court in the *Frost* case enjoined both the operation of the gin by the Cooperative Company and the issuance of a certificate of convenience and necessity by the Oklahoma Corporation Commission. That is precisely the relief granted Wayne Oakland Bank by both of the lower courts in this case.

It is respectfully submitted that the decision of the Court of Appeals in this case is in conflict with neither the opinion of this Court in the *Tennessee Power* case nor of the Court of Appeals for the District of Columbia in the *Kansas City Power and Light* case and that the decision of the Court of Appeals in this case was correct.

CONCLUSION

WHEREFORE, the petition for a writ of certiorai should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Regulations of the Comptroller of the Currency C. F. R. Title 12, Chap. I

"§4.5 *Authorizing branches and seasonal agencies—(a) Branch banks.* (1) Under the provisions of R. S. 5155, as amended; 12 U. S. C. 36, national banks may, subject to the approval of the Comptroller of the Currency, establish and operate branches and seasonal agencies. Upon receipt of an application from a national bank or any bank operating in the District of Columbia, for a branch or seasonal agency, the appropriate District Chief Examiner is instructed to make an investigation, taking into consideration the financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the number of branches now in operation and their location, the proposed location of the new branch and the distance from the head office, the nearest banking facilities, the convenience and needs of the community to be served by the new branch, the nature of the potential clientele and possible business available, including an estimate of contemplated volume within a reasonable period of time and the prospects of successful operation of the branch, together with any other pertinent factors.

"(2) The examiner's report is submitted to the District Chief Examiner who forwards it to this office with his own comments and recommendation. The information and data is analyzed, briefed and routed in the same way as an application for a charter.

"(3) If the decision is unfavorable the applicant bank is so notified. If the decision is favorable the Comptroller issues a formal certificate evidencing his approval and consent to the establishment and operation of a branch bank at the designated location.

"(b) *Removal of branch banks or branch offices.* A branch of a national banking association may not be moved

from one location to another without first obtaining the consent and approval of the Comptroller. The procedure for obtaining consent to such a moving of the location of a branch follows the same general course as that of the application for a branch, although the information required on any investigation made will vary with the circumstances and reasons given for the proposed move. If the approval is granted the Comptroller executes a formal statement to that effect, which is forwarded to the bank applying therefor."

* * *

APPENDIX B

Excerpts From Correspondence, Minutes and Other Documents Showing That National Bank of Detroit and Comptroller Regarded the Second Proviso of Section 34 of the Michigan Financial Institutions Act as Applicable to the Proposed Establishment by National Bank of Detroit of a Branch in Troy

Paragraph 12 of Stipulation of Facts

* * *

In June, 1955, shortly after the vote of the residents of the Troy Township area on June 7, 1955 to incorporate substantially all of that area (including the theretofore unincorporated Village of Big Beaver) it was reported to the Senior Executives of NBD that under State law if W-O should obtain approval of the branch at Big Beaver previously applied for by it and open such branch for business, no other bank could thereafter obtain approval of a branch in Troy. In view of the foregoing, the Senior Executives of NBD again reviewed the situation and on January 19, 1956 recommended to the Executive Committee of NBD that they be authorized to apply to the Comptroller for permission to establish a branch near the intersection of Maple and Crooks Roads in Troy. (JA 43a)

Minutes of Meeting of Executive Committee of Board of Directors of National Bank of Detroit held January 19, 1956

* * * While plans of the Wayne-Oakland Bank for the construction of a building in the Big Beaver Community on Rochester Road in the City of Troy have recently been reported in the press, there is no indication that the branch so authorized has been placed in operation. Our counsel is of the opinion that prior to the time the Wayne-Oakland branch commences operation there is no legal obstacle to the granting of authorization for the establishment and operation of branch offices by other outside banks, national or state, which otherwise qualify under Michigan law. * * * (JA 62a)

Letter from Vice-President and Cashier of National Bank of Detroit to Deputy Comptroller of the Currency Transmitting Application for Approval of Troy Branch of National Bank of Detroit

January 19, 1956

* * * Due to the provisions of the Michigan statute limiting the establishment of branches, once it (Wayne-Oakland Bank) does commence operation of that branch office no other outside bank will be able to establish a branch in the City of Troy. However, our counsel advise us that prior to that time there is no legal obstacle to the granting of authorization for the establishment and operation of branch offices by other outside banks, national or state, which otherwise qualify under Michigan law. * * * (JA 64a)

Letter from Vice-President of National Bank of Detroit to Deputy Comptroller of Currency

January 21, 1956

Following our conversation on the 20th, it is my thought that a summary of the points we discussed might be helpful

to you in reaching a decision on our application for a branch office in Troy.

Number One: The establishment of this office by our bank is permitted by the State law so long as no other bank or branch office is operating in the community—which is the case at this time. * * * (JA 81a)

Letter from Vice-President of National Bank of Detroit to Deputy Comptroller of Currency

February 23, 1956

* * *

The time element in our application for the branch in Troy is important inasmuch as approval must be granted before the Wayne-Oakland Bank opens its office at Rochester Road and Owendale in Troy. * * * (JA 84a)

Letter from Vice-President of National Bank of Detroit to Deputy Comptroller of Currency

March 14, 1956

* * *

We are waiting with anxiety in the hope that we will get your approval of our Troy office before the Wayne-Oakland Bank opens and thereby freezes us out, as can happen under Michigan law as we all know. (JA 87a)

Letter from Deputy Comptroller of the Currency to Commissioner of the Michigan Banking Department

March 19, 1956

* * *

Our reasons for approval of the National Bank of Detroit's application are as follows:

* * *

(3) Unless the National Bank of Detroit receives approval of its application for a branch office in the

City of Troy now, it will under present statutes be estopped from establishing a branch there after another banking office is in operation. * * * (JA 93a)

APPENDIX C

Analysis of Annual Reports of Comptroller of Currency to Congress 1922-1932

In his 1922 report (228a-230a), the then Comptroller of the Currency urged on Congress the enactment of branching legislation in very forceful terms. He said that the national banking system had been and should continue to be "the backbone of the Nation's financial structure"; that forces were at work "inevitably tending to the disintegration, or at least the progressive weakening of the Federal reserve system". In elaborating on this he pointed out that national banks were compelled to compete with state banks; that in many respects state laws were more liberal than national banking laws and constituted an inducement to banks to operate under state rather than federal law; that one respect in which the laws of many states were much more liberal than the national banking laws was in connection with the establishment of branches; that because of the advantages to operating under state laws many national banks were surrendering their federal charters and obtaining charters under state laws. After referring to the matter in some detail, the Comptroller said:

> "* * * we are in grave danger of losing our larger national banks in states where more liberal charters are granted to State banks unless we extend to national banks the privileges and facilities in carrying on their business that are accorded to State banks. If we lose the national banks, we disintegrate the Federal reserve system, for experience has shown that only a small proportion of State banks will enter the system." (R. 229a-230a)

This portion of his report concluded with a recommendation that Congress amend the national banking law to grant to national banks within the discretion of the Comptroller the privileges enjoyed in each state by its state banks (R. 230a).

In his reports for 1923 and 1924 the Comptroller again urged on Congress the elimination of this discrimination between state and national banks, giving the same reasons (R. 230a-231a). Legislation of this type was again urged on Congress in the 1925 report (R. 231a). Finally, in 1927, Congress amended Revised Statutes 5155 (12 U.S.C. 36) so as to grant some authority to national banks to establish branches. (Act of February 25, 1927, Public Law No. 639, Sixty-Ninth Congress). The principal feature of the 1927 Act was to grant a national bank the right to establish and operate *inside* branches "if such establishment and operation are at the time permitted to state banks by the law of the state in question". The amendment, however, limited the number of branches in a city according to the population of the city. But the proponents of branch banking halted only briefly in their efforts.

In his 1929 report, the Comptroller of the Currency again urged the passage of legislation enlarging the branching rights of national banks (R 232a-241a). He referred to the large number of bank failures that had taken place in the country in recent years and pointed out that failures of state banks greatly outnumbered those of national banks and that practically all of the failures, both state and national, had occurred in the small banks rather than those in the larger cities (R. 233a-234a). He frankly stated his position that the only feasible method of supplying necessary and safe banking facilities to the occupants of the outlying areas was to permit the large city banks to establish branches in the outlying areas, and that the economic welfare of the Country required it (R. 234a-235a). He obviously expected that this would result in the gradual elimination of the small banks in the outlying areas. He urged on

Congress the adoption of legislation which would permit a national bank to establish a branch anywhere in the "trade area" in which the bank was situated (R. 236a). In the creation of these trade areas state lines were to be disregarded, the indication being that in some instances a trade area might be as large as an entire Federal Reserve District and in some instances might even cross the boundary of Federal Reserve Districts. The facts set forth in the report gave a large measure of support to the arguments he advanced for the proposed legislation.

In 1930, the Comptroller again urged on Congress passage of such legislation, making largely the same arguments and setting forth certain additional facts to support them (R. 241a-247a) and the same recommendations were repeated in his 1931 and 1932 reports.